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# The Indentured Servants of Academia: The Adjunct Faculty Dilemma and Their Limited Legal Remedies

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# The Indentured Servants of Academia: The Adjunct Faculty Dilemma and Their Limited Legal Remedies

JOHN C. DUNCAN, JR.\*

## TABLE OF CONTENTS

AN INTRODUCTION: WHY A LEGAL ARGUMENT FOR ADJUNCT FACULTY? .....	514
I. AN OVERVIEW OF THE ADJUNCT DILEMMA .....	515
<i>A. Defining the Title of a Part-Time Instructor</i> .....	516
<i>B. Labeling the Motivation of the Non-Tenured Instructor</i> .....	518
<i>C. Uses and Advantages of the Adjunct at Different Institutions</i> ...	521
1. Community Colleges .....	521
2. Urban Institutions, Branch Locations, and Private Schools ..	522
3. Large Urban Universities .....	522
4. Law, Medical, and Other Professional Schools .....	523
<i>D. Typical Difficulties Encountered by Adjuncts</i> .....	524
1. No Assurance of Employment .....	525
2. No Orientation .....	526
3. Lack of Benefits .....	528
4. Inequitable Compensation .....	528
<i>E. Attitudes Toward Adjunct Faculty</i> .....	529
1. Adjuncts from a University Prospective .....	529
2. Tenure and the Two-Tiered System .....	530
3. Professional Educators' Viewpoints .....	534
II. LIMITED LEGAL REMEDIES .....	535
<i>Introduction</i> .....	535
<i>A. Fourteenth Amendment Protection of Due Process and Equal     Protection</i> .....	537
1. The State Action Doctrine and Constitutional Protection ....	537
2. The Real Problem—Lack of Due Process .....	539
a. The Protection Provided by the Due Process Clause .....	539

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b. Defining Property Interest Through Status; <i>De Facto</i> Tenure .....	540
c. What Process Is Due the Adjunct with an Expectancy of Reemployment? .....	544
d. State Statutes Dictate Status .....	548
3. Equal Protection of Adjuncts and Other Faculty .....	551
B. <i>Contractual Provisions Protecting Adjuncts' Rights</i> .....	555
1. Terms of Employee Handbook Incorporated Into Contract ..	555
2. Other Contract Theories Generally Unsuccessful .....	557
C. <i>Protection Through Collective Bargaining</i> .....	559
1. Including Part-Timers and Full-Timers in a Joint Bargaining Unit .....	561
a. The NLRB's Exclusion of Adjuncts from Bargaining Units with Full-Timers .....	561
b. Partial Inclusion of Part-Time Faculty by State Labor Boards .....	566
2. Part-Timers Forming a Separate Bargaining Unit .....	569
3. Factors of Consideration for Adjuncts Entering Collective Bargaining .....	572
a. Ability to Strike .....	574
b. Job Security .....	576
c. Costs of Collective Bargaining .....	576
III. RECOMMENDATIONS .....	580
A. <i>Non-Legal Recommendations</i> .....	580
B. <i>Legal Recommendations</i> .....	584
CONCLUSION .....	585

#### AN INTRODUCTION: WHY A LEGAL ARGUMENT FOR ADJUNCT FACULTY?

In this half of the twentieth century, the academic equivalent of the indentured servant is the adjunct faculty member in higher education. Adjuncts cannot say or do much about their plight. If they try to seek redress, they will simply not be rehired. They rarely have an office, and even if there is one, it must be shared. They lack appeal rights; they too are just not rehired. There is little collective bargaining; there is very little union power; adjuncts often are not included in bargaining units. A contract may exist but purely at the discretion of the university. There is little individual contract bargaining power. The full-time professors, and often the students, view the adjunct faculty as second-class teachers. The adjuncts lack benefits and the pay is nominal. There appears to be little the adjunct can do to improve his or her indentured servant-like dilemma.

The dilemma of adjunct faculty leads to what should be considered a violation of due process rights. Certainly, individuals within a profession should have some collective rights to protect those individuals within that class.<sup>1</sup> However, the

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1. As noted *infra* Part II.A.2, tenured and other full-time faculty are often treated as a protected class, but adjuncts are not viewed in this manner.

courts do not generally view adjuncts as a collective whole, at least not to the same degree they view other classifications of teachers, such as tenured or other full-time faculty. An observation of cases involving adjuncts shows that courts will most often look to the specific facts involving the school and the adjuncts seeking to protect their rights before the court will protect the right. An adjunct who is terminated without cause, notice, or opportunity to be heard may not have a protected right to the job, even if the adjunct had continued employment. If the relationship between the school and the adjunct is not one which would give rise to a protected right, the courts will not protect the adjunct. In sum, some adjuncts will have protected rights, but those rights will arise individually.

If the adjunct has a right, then the legal mind should recall the ideological legal maxim, *ubi jus, ibi remedium*.<sup>2</sup> However, this classic statement does not always hold true for an aggrieved adjunct faculty member. Adjuncts seeking judicial relief seem to have to piece together an argument which would lead to a remedy. Some rely upon constitutional arguments, while others rely on collective bargaining agreements or individual contracts. The remedies granted by courts vary as much—or more—than the arguments presented by the adjuncts. Adjuncts are on the far end of the spectrum in the field of education. They are not getting their fair share of the pie in terms of the legal arena.

This Article first examines who are the adjunct faculty, what are their dilemmas, and how are they viewed in the academic world. The heart of the paper then explores the limited legal remedies available. The essential problems of lack of due process and minimal protection through collective bargaining and contractual agreements are examined with an eye toward some suggested approaches to improve the plight of adjunct faculty.

## I. AN OVERVIEW OF THE ADJUNCT DILEMMA

One may consider the following observation as illustrative of the adjunct's dilemma:

I was quite literally stunned . . . when a series of Gary Trudeau's "Doonesbury" cartoons clearly spelled out the connection for all to see between the death of tenure and the hiring of temps. . . . [I]n the first strip (9-9-96), a college president asks an assistant how their budget got back in the black. "Tuition hikes plus getting rid of tenure." "Amazing—and we can still attract competent faculty?" The assistant responds, "Trust me, sir. It's a buyer's market." Then we see a crowded auction like scene in which a man says over a megaphone, "Okay, we need two Romantic Lit. instructors today!" Voices from throng holler, "Here!" "Ici!"

In the second strip (9-10-96), a voice from the same crowd of job-seekers calls out "I'm a Cornell Ph.D.! I don't expect tenure, obviously, but I would like a two-year contract, with medical and three months severance!" The man with the megaphone asks, "Any other candidates?" Another voice responds, "Over here! I'll work for food!" In the third strip (9-11-96), there is a call for "a Keynesian economist for a one-semester lecture course! Any takers?" When an anonymous figure in the crowd raises his hand, he is asked what his requirements are. "A living wage, and to be treated like a human being!" The

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2. Translated as "where there is a right, there is a remedy."

megaphone man says, "I'll keep looking," to which this job-seeker responds, "Okay, okay, forget the human being part!"

One of my first thoughts, after seeing these strips, was that I'll have to quit referring to [adjuncts] as higher education's best-kept dirty little secret. Shucks, we made Doonesbury—we're out there now! We are, indeed, the norm. In fact, we are the future. They *like* to hire us. We are not simply cheaper than tenure-track faculty; we are, perhaps more importantly, much easier to control.<sup>3</sup>

### *A. Defining the Title of a Part-Time Instructor*

In the United States, part-time instructors constitute approximately one-third of the teaching population at colleges and universities.<sup>4</sup> However, there is no standard definition used to describe this large minority of instructors in our higher learning institutions. Instead, there are a variety of measures used to demarcate part-time faculty:

Part-time faculty are designated by myriad titles and are classified by a confusing variety of appointments and salary terms, so that comparison among them is difficult. They are called "adjuncts," "special lecturers," "acting faculty," "wage-section faculty," "hourly," "short-term," "emergency," and "temporary" employees—despite the obvious potential for abuse latent in these appellations.<sup>5</sup>

The Department of Labor labels part-time employment as less than thirty-five hours worked per week.<sup>6</sup> The problem with this bright-line test is that in these institutions, one could easily work more than forty hours per week and still be part-time as the full-time faculty typically work more than fifty hours a week as

3. Chris McVay, *Are Adjuncts Fiddling While the Academy Burns?*, ADJUNCT ADVOC., Nov.-Dec. 1996, at 17, 17-18 (emphasis in original). McVay wonders, "What innovations and what sort of controversial thinking, after all, can be produced by a system in which cowed faculty have become the norm? . . . Could we even still call it *higher education*?" *Id.* at 18 (emphasis in original). McVay urges that, although there are some problems with most universities' tenure systems, "I have far greater problems with the corporate think that is now running universities. First and foremost is that these powers that-be apparently want to fill our colleges and universities with 'Stepford professors.'" *Id.*

4. See Judith M. Gappa, *Employing Part-Time Faculty: Thoughtful Approaches to Continuing Problems*, AM. ASS'N FOR HIGHER EDUC. BULL., Oct. 1984, at 3, 3 (citing the NATIONAL CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATIONAL STATISTICS, 1983-84 (Dec. 1983)); see also George W. Bonham, *Part-Time Faculty: A Mixed Blessing*, CHANGE, Apr. 1982, at 10, 10; Peggy A. Hine & Janina C. Latack, *The Paradox of the Part-Time Professional*, 41 J. NAT'L ASS'N FOR WOMEN DEANS, ADMINS., & COUNS. 98, 98 (1978) (citing NATIONAL CTR. FOR EDUC. STATISTICS, U.S. DEPT. OF HEALTH, EDUC., AND WELFARE, DIGEST OF EDUCATIONAL STATISTICS (1975)).

5. AFT HIGHER EDUC. PROGRAM AND POL'Y COUNCIL TASK FORCE ON PART-TIME FACULTY, AMERICAN FED'N OF TEACHERS, STATEMENT ON PART-TIME FACULTY EMPLOYMENT 2-3 (1996) [hereinafter TASK FORCE ON PART-TIME FACULTY].

6. See Hine & Latack, *supra* note 4, at 98 (citing Janice Neipert Hedges & Stephen J. Gallogly, *Full and Part-Time: A Review of Definitions*, MONTHLY LAB. REV., Mar. 1977, at 21, 21-28); see also David W. Leslie, *The Part-Time Faculty Labor Force*, in EMPLOYING PART-TIME FACULTY 1, 2 (David W. Leslie ed., Summer 1978).

opposed to the generally accepted forty-hour full-time week.<sup>7</sup> Governmental agencies on both the national and state level have made rulings regarding full-time and part-time faculty.<sup>8</sup> Some states have provided a statutory definition differentiating the two.<sup>9</sup> The institutions themselves sometimes use credit hours taught to differentiate between part- and full-time faculty.<sup>10</sup> The multiple and irreconcilable differences in the definitions seem to require another means of understanding part-time faculty. This labeling also leads to a legal question of classification of faculty members which may determine the existence of a property interest protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

A popular expression used to describe part-time faculty is "adjunct" faculty. *Webster's Dictionary* defines "adjunct" as "something joined or added to another thing but not essentially a part of it . . . a person associated with or assisting another in some duty or service."<sup>11</sup> Although *Webster's* definition encompasses the adjunct in word and spirit, further refinement is necessary.<sup>12</sup> As will be fleshed out later, although some faculty members are hired on a full-time basis, they are treated differently from the tenured professors. These full- and part-time faculty members have to endure a great deal of disparaging treatment from the administration and tenured faculty.<sup>13</sup> Therefore, using "adjunct" is a comprehensive means to describe the whole class of individuals, both full- and part-time, who have been labeled "part-time" faculty in the past.

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7. See Hine & Latack, *supra* note 4, at 98 (noting that this measure is imperfect because of the lack of a consensus of what constitutes full-time).

8. See *infra* Part II.C.

9. The National Labor Relations Board ("NLRB") and state labor boards have provided definitions of part- and full-time employment to determine which faculty members are allowed to participate in the collective bargaining unit. States have provided statutory definitions distinguishing part- and full-time to establish which employees may have an expectation of reemployment. See, e.g., *William Rainey Harper Community College v. Harper College Adjunct Faculty Ass'n*, IEA/NEA, 653 N.E.2d 411 (Ill. App. Ct. 1995); *Vermont State Colleges Faculty Fed'n v. Vermont State Colleges*, 566 A.2d 955 (Vt. 1989). Both of these topics are discussed in the "Limited Legal Remedies" part of this Article, *infra* Part II.

10. There are not only differences in teaching loads from university to university, but also within universities themselves in the different departments and further within the same department from the undergraduate to post-graduate levels.

11. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 27 (Philip Babcock Grove ed., 1993) [hereinafter WEBSTER'S].

12. See P.D. Lesko, *Re-examining the Role of the "True Adjunct,"* CHRON. HIGHER EDUC., Jan. 6, 1995, at B4 (letter in the Opinion section).

13. See George Van Arsdaile, *De-Professionalizing a Part-Time Teaching Faculty: How Many, Feeling Small, Seeming Few, Getting Less, Dream of More*, 13 AM. SOCIOLOGIST 195, 197 (1978).

*B. Labeling the Motivation of the Non-Tenured  
Instructor<sup>14</sup>*

The faculty member of a college or university cannot be easily understood as either full- or part-time. There are shades of both full- and part-time. For example, *regular full-time faculty* are either tenured professors or full-time teachers not concerned with the tenure track.<sup>15</sup> *Tenure track faculty* are those employed either full- or part-time working to fulfill an institution's requirements for tenure.<sup>16</sup> *Nontenure track* members are full-time employees without full-time status and no expectation of full-time employment.<sup>17</sup> *Hopeful full-timers* are part-timers because they were not offered a full-time position.<sup>18</sup> *Temporary faculty*

14. It is difficult to label a motivation of adjuncts as a whole, since the motivation of any particular adjunct will differ from another. Many adjuncts teach only part-time by choice. See STANDING COMM. ON HIGHER EDUC., NATIONAL EDUC. ASS'N, REPORT AND RECOMMENDATIONS ON PART-TIME, TEMPORARY & NONTENURE TRACK FACULTY APPOINTMENTS 4, 6 (1988). This adjunct may desire to act as a full-time employee in every respect except the time spent teaching. See *Report on the Status of Part-Time Faculty*, 67 ACADEME: BULL. OF THE AM. ASSOC. OF UNIV. PROFESSORS, Feb.-Mar. 1981, at 29, 31-32 [hereinafter *Status*]. Some adjuncts would like to be considered for tenure despite working part-time. Some may have just completed their tenure (labeled retirees in this Part) but seek to continue teaching, while others would like to spend their time pursuing other activities. See *id.* at 32.

15. The full-time faculty without tenure in this group enjoy the security of long-term employment at some institutions. See STANDING COMM. ON HIGHER EDUC., *supra* note 14, at 5; *Tenure*, NEA UPDATE, Sept. 1995, at 1, 1-2 (suggesting almost 75% of the full-time faculty are eligible or have already received tenure). The *Update* publication discusses tenure as it relates to full- and part-time faculty members. Although the *Update* tries to persuade that all is well in higher education and issues surrounding the dilemma regarding tenure are myths, or if some problem does exist that it is getting better, a thoughtful reading of the *Update* and its statistics shows a system that favors tenured employees for no other reason than it is a system already in place.

16. See *Tenure*, *supra* note 15, at 1 (reporting that if only full-time faculty are considered, 21% are on the tenure track, but if part-time faculty are also considered, only 14% of faculty are on tenure track). First, consider that adjunct faculty only comprise one-third of the whole when included in the statistics. See *id.* Second, remember that many of the adjuncts within the one-third population desire tenure. Take those two facts and try to reconcile that when the 33% part-time population of higher learning institutions is lumped with the 66% full-time faculty population, the severe absence of tenure available to the part-timers results in the 33% population segment being able to bring down the 66% population segment by 7%. See *id.* at 2 tbl.2. This is a strong indication of the disproportionate treatment part-timers receive by the institutions.

17. These individuals have pieced together a full-time schedule at an institution, but are paid on the low end of the full-time schedule. See NATIONAL EDUC. ASS'N, A SURVIVAL HANDBOOK FOR PART-TIME & TEMPORARY FACULTY 2 (1989); *Tenure*, *supra* note 15, at 4. This designation is used to differentiate the part-timers that piece together a full-time schedule within one university from those part-timers that have to piece together part-time jobs to create a full-time schedule at multiple places ("*part-mooners*").

18. This group most resembles the full-time faculty in qualifications and commitment. They are also most prone to exploitation. See *Status*, *supra* note 14, at 31; Thomas W. Fryer, Jr., *New Policies for the Part-Time Faculty*, in LEADERSHIP FOR HIGHER EDUCATION: THE CAMPUS

members, such as visiting professors or guest lecturers, are full-time employees for a definite time and purpose.<sup>19</sup> *Full-mooners* are those part-time faculty members who have a full-time job elsewhere.<sup>20</sup> *Part-mooners* have at least two part-time jobs.<sup>21</sup> There are also *students* who work part-time in a department different from that within which they are registered, as well as the more common *graduate student* or *teaching assistant* working in a particular discipline in pursuit of degree.<sup>22</sup> Finally, the *sunlighters* are adjunct faculty working only part-time for a gamut of reasons such as, but not limited to, being able to be home for the family, pursuing personal interests, or because they are *retirees*.<sup>23</sup>

Thirty-eight percent of adjunct faculty are hopeful full-timers.<sup>24</sup> In this discussion, the part-mooners are also considered because they too are hoping for a full-time position although they work multiple part-time jobs.<sup>25</sup> Part-mooners are also prone to exploitation.<sup>26</sup> A hopeful full-timer may be subjected to belittling treatment as he works at an institution with the hope of an offer for a full-time position. Often, a hopeful full-timer's credentials are like those of regular full-timers. Both have essentially the same responsibilities and sense of

VIEW 50, 51-52 (Roger W. Heyns, ed., 1977) (papers presented at the 59th Annual Meeting of the American Council on Education, New Orleans, La., Oct. 6-8, 1976).

19. See NATIONAL EDUC. ASS'N, *supra* note 17, at 1; see also STANDING COMM. ON HIGHER EDUC., *supra* note 14, at 5.

20. The author would like to point out that while this may be a tongue-in-cheek denomination, the "mooner" aspect of this classification is derived from the term "moonlighting." See Andrew Karmen, *Comments to George Van Arsdale, De-Professionalizing a Part-Time Teaching Faculty: How Many, Feeling Small, Seeming Few, Getting Less, Dream of More*, 13 AM. SOCIOLOGIST 206, 206 (1978).

21. See Lesko, *supra* note 12, at B4 (stating that part-mooners are "teaching professionals who, because of an antiquated system of work-for-hire within higher education, are forced to piece together full-time teaching work by teaching a number of courses at, perhaps, several schools").

22. See Fryer, *supra* note 18, at 50.

23. See GEORGE E. BILES & HOWARD P. TUCKMAN, PART-TIME FACULTY PERSONNEL MANAGEMENT POLICIES 12-13 (1986); Louis S. Albert & Rollin J. Watson, "Mainstreaming" the Part-Time Faculty: Issue or Imperative? 8 (1978) (unpublished paper, on file with the Office of Educational Research and Improvement, U.S. Department of Education); see also Malcolm G. Scully, *Part-Time Teachers: Many Are Angry*, CHRON. HIGHER EDUC., Jan. 20, 1975, at 1.

24. See BILES & TUCKMAN, *supra* note 23, at 11 (showing that "students," who likely intend to be full-timers, compose 21.2% and "hopeful full-timers" compose 16.6%).

25. Adjunct faculty reported having 1.7 jobs on average in addition to their teaching position. See Karmen, *supra* note 20, at 206 (stating that Karmen taught "five classes a term at three different institutions").

26. See Lesko, *supra* note 12, at B4.

By paying most part-time faculty absurdly low per-course wages, providing no benefits, support services, or professional-development funding, colleges and universities throughout America save hundreds of millions of dollars each year.

By routinely denying adjuncts due process, and by abusing the work-for-hire arrangement, colleges and universities propagate an exploitative system.

*Id.* Further, it is noted that these adjuncts accept the unfairness of the situation in hopes of getting their "foot in the door." Art Pollock & Robert L. Breuder, *The Eighties and Part-Time Faculty*, COMMUNITY C. REV., Spring 1982, at 58, 59.



commitment to the institution. Unlike regular full-timers, however, hopeful full-timers frequently do not enjoy fringe benefits,<sup>27</sup> office space,<sup>28</sup> support staff,<sup>29</sup> support from colleagues,<sup>30</sup> job security,<sup>31</sup> or due process.<sup>32</sup>

Full-mooners do not rely on their pay for teaching as a primary means of support. Full-mooners generally do not seek a full-time position with the institution, but share many of the other attributes as hopeful full-timers.<sup>33</sup> These professionals enrich the college curriculum with their expertise and time.<sup>34</sup> Their savvy in the work place can provide direction in the departmental development and the curriculum.<sup>35</sup> Instead, the institutions subject full-mooners to the same abuses as hopeful full-timers.

Some studies characterize the part-time faculty in more simple terms than a myriad of labels. *Part-Time Faculty in American Higher Education* categorizes four motivations: intrinsic, professional, careerist, and economic.<sup>36</sup> The authors present the following descriptions and real-life examples of each of these four important motivators:

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27. See *infra* text accompanying notes 90-92.

28. Institutions seldom provide office space, telephones, secretarial assistance, or assistance from graduate assistants on the same basis as full-time faculty. See Pollock & Breuder, *supra* note 26, at 60. Without providing a place to make an adjunct available to the student for counseling or conversation, the institution frustrates student-professor exchanges. See *id.*; see also Van Arsdale, *supra* note 13, at 197 (noting the only private office space is the lockable file drawer assigned to an adjunct); Gappa, *supra* note 4, at 4 (noting that "[p]art-timers frequently hold 'office hours' in campus coffee shops, student lounges, or even their homes").

29. In addition to lack of office space, institutions also fail to provide secretarial and support services. See Gappa, *supra* note 4, at 3-4. Secretarial services are important to an instructor because of the time involved in the tasks that are performed by the service. In most cases, the adjunct must also work around the institution's failure to provide basic office equipment, such as a mail box, copy machine, typewriter, computer, and telephone. Instead, the adjunct must spend his or her own time and money to copy and compose materials for class sessions. See Van Arsdale, *supra* note 13, at 197.

30. Full-time faculty often treats adjuncts as the "field hands of academe." NATIONAL EDUC. ASS'N, *supra* note 17, at 3. See also David W. Leslie & Ronald B. Head, *Part-Time Faculty Rights*, EDUC. REC., Winter 1979, at 46, 49-50 ("Part-timers are seen as competitors for the wage dollar, . . . undercutting the market and forcing wages down.").

31. See *infra* text accompanying notes 71-76.

32. See *Status*, *supra* note 14, at 29.

33. See Thomas W. Fryer, Jr., *Designing New Personnel Policies: The Permanent Part-Time Faculty Member*, C. & U. PERSONNEL ASS'N J., Sept. 1977, at 14, 15.

34. See Louis W. Bender & James O. Hammonds, *Adjunct Faculty: Forgotten & Neglected*, COMMUNITY & JUNIOR C. J., Oct. 1972, at 20, 21.

35. The institutions have a wealth of information available to them regarding everything from trends in management to availability of resources through its adjunct faculty but yet are blind to the contribution these professionals could make.

36. DAVID W. LESLIE ET AL., *PART-TIME FACULTY IN AMERICAN HIGHER EDUCATION* 41 (1982). This survey of part-timers is from data on the Exxon/Virginia National Study compiled by the authors. The authors proposed a research project to provide information on how and why part-time faculty were used. Exxon Educational Foundation funded the research, which began at the Center for the Study of Higher Education at the University of Virginia from 1977-1979. See *id.* at v.

Those who are intrinsically motivated seek some sort of personal satisfaction. They teach for the enjoyment, fulfillment, a sense of accomplishment, the opportunity to be heard, or to make a contribution to human development. Others teach to escape a more routine or less stimulating environment. Still others teach for the prestige or status attached to college-level instruction. In all cases, it makes them feel good and they view it almost as a form of recreation, if not therapy.

Intrinsically motivated part-timers may have originally taken the role for economic or other reasons, but when asked why they teach now, their response is likely to be similar to that of a number of our interviewees: "Because I'm hooked on it."<sup>37</sup>

However motivated, many part-time instructors seek a full-time teaching position.<sup>38</sup> When an institution converts a part-time teaching position into a tenured position, it typically advertises nationally.

Indeed, one of the bitterest ironies for some part-time faculty is that they may teach at as many as three or four different institutions in order minimally to sustain a professional life only to find that working part-time is taken as a sign that they are not serious about their careers!<sup>39</sup>

This misconception ignores the reality of the motivation behind an adjunct accepting the position. In many cases, working as an adjunct marks the beginning of an academic career.<sup>40</sup>

### *C. Uses and Advantages of the Adjunct at Different Institutions*

The practice of employing nontenure-stream, part-time faculty began in the 1960s, during a time of growing enrollment and unparalleled expansion.<sup>41</sup> Between 1971 and 1986, the number of part-time faculty increased by 133%, while full-time faculty increased only 22%.<sup>42</sup> This trend has continued throughout the 1990s.<sup>43</sup>

#### 1. Community Colleges

Adjuncts comprise more than half of the employed faculty at community colleges.<sup>44</sup> Adjunct faculty provide a margin of safety since their wages are

37. *Id.* at 41-42.

38. *See id.* at 44. Leslie found "little evidence that a part-time position leads eventually to full-time employment and it would appear that many of the careerist aspirations of these persons are destined to be unrealized." *Id.*

39. *Report on the Status of Non-Tenure-Track Faculty*, 78 ACADEME: BULL. OF THE AM. ASSOC. OF UNIV. PROFESSORS, Nov.-Dec. 1992, at 39, 45 [hereinafter *Report*].

40. *See* Van Arsdale, *supra* note 13, at 197.

41. *See* TASK FORCE ON PART-TIME FACULTY, *supra* note 5, at 1.

42. *See id.*

43. *See id.*

44. *See* Pollock & Breuder, *supra* note 26, at 59; LESLIE ET AL., *supra* note 36, at 19.

usually low and they are not normally paid benefits.<sup>45</sup> Adjunct faculty members hope to be offered a full-time teaching position. They take the part-time assignment with the hope of getting a "foot in the door."<sup>46</sup> In turn, administrators acquire instructors at half the pay and without strings attached. One college provost viewed part-time instructors as "fine wine at discount prices."<sup>47</sup> The official noted, "[Part-time faculty members] are often very fine teachers, and our money goes much [further] than when we put it all into full-time faculty. Furthermore, we can 'pour it down the drain' if they have any flaws at all. We have made no big investment in part-time faculty."<sup>48</sup>

The use of adjunct faculty members precludes a long-term commitment to an individual.<sup>49</sup> As a result, it becomes easier for an institution to change its academic program and meet market demand.

## 2. Urban Institutions, Branch Locations, and Private Schools

For much of the same reason, other institutions employ a large number of adjunct faculty.<sup>50</sup> In a number of small urban institutions, branch locations of large universities, and private four-year institutions, it is important to update and develop new course selections to encourage students to pursue their education at these schools.<sup>51</sup> Administrators at these market-sensitive institutions find the use of the adjuncts a low-cost means of improving the curriculum, hence boosting enrollment.<sup>52</sup>

## 3. Large Urban Universities

While enrollment drives the smaller institution, the large, urban university finds the use of the adjunct somewhat of a luxury. The use of adjunct faculty allows the large university to offer unusual degree choices.<sup>53</sup> The pool of talent in a large city exposes the university to many professionals with rare and diverse

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45. See Fryer, *supra* note 33, at 15. "Institutions have found the use of part-time faculty expedient because of almost universally lower salaries paid these persons." *Id.*

46. Pollock & Breuder, *supra* note 26, at 59.

47. JUDITH M. GAPP & DAVID W. LESLIE, *THE INVISIBLE FACULTY* 141 (1993).

48. *Id.* (quoting a provost at one of the representative site institutions which the authors visited, gathered material, and conducted interviews).

49. This employee is treated as a "replaceable part, which can be plugged into and out of a . . . work process . . . where cyclical demand increases and decreases." LESLIE ET AL., *supra* note 36, at 12.

50. See *Tenure*, *supra* note 15, at 2-3.

51. See Bender & Hammonds, *supra* note 34, at 21 ("[T]he location of an institution often enables geographic specialization because of particular local resources . . .").

52. See Leslie & Head, *supra* note 30, at 52. Many universities have off-campus programs at military bases such as University of Maryland, Troy State University, Chapman College, Florida Institute of Technology, and St. Leo College. These schools rely heavily on adjuncts.

53. See LESLIE ET AL., *supra* note 36, at 28-29.

concentrations.<sup>54</sup> The ability to offer obscure educational programs can draw students to the university from across the country.

#### 4. Law, Medical, and Other Professional Schools

Graduate and professional schools utilize the talents of adjunct faculty extensively.<sup>55</sup> "Much of the clinical instruction in medical, nursing, dental, and other related professional schools is and has long been provided by substantial numbers of part-time . . . teachers."<sup>56</sup> Graduate programs draw many of their teachers from various professions. The areas generally taught by adjuncts, due to constant change within them at the undergraduate level, usually have the practicing professionals of the fields teaching many of the graduate classes.<sup>57</sup>

Law schools often utilize adjunct faculty to take advantage of a practicing attorney's knowledge in a particular subject area. The use of adjunct faculty and lecturers at different schools varies, depending on the institution. For example, schools such as New York University School of Law and Northwestern University School of Law employ more than 100 adjunct faculty members.<sup>58</sup> Northwestern employs practicing attorneys from several law firms among the legal specialists teaching as adjunct faculty members, including the Honorable Joel M. Flaum, a judge for the Seventh Circuit of the United States Court of Appeals.<sup>59</sup> Other law schools employ considerably fewer adjunct faculty members or lecturers. For example, the University of Michigan Law School employs only fifteen adjunct

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54. *See id.*

55. By comparison, research universities are the least likely to use adjunct faculty. *See id.* at 109. Only one-fifth of research personnel are part-time. *See* Leslie & Head, *supra* note 30, at 46-47; *see also* LESLIE ET AL., *supra* note 36, at 19-20. Long-term endowed projects requiring a great deal of time and commitment entrench these facilities. The institutions place a great deal of importance on the generation and gathering of knowledge, used to promulgate further knowledge. Administrators are reluctant to pass this responsibility to non-permanent, part-time faculty. *See id.* at 109.

56. Leslie & Head, *supra* note 30, at 52.

57. *See* B. Robert Anderson, *Adjunct Faculty Deserve a Better Deal*, CHANGE, Sept. 1975, at 8, 8 ("Many new disciplines are emerging; others are changing. . . . People with practical experience are often the best sources for learning about these changes.").

58. Due to the difficulty in obtaining timely statistics from print media sources, these statistics were taken from the school's respective internet web pages, as of the 1997-1998 academic school year. *See* New York University School of Law, *Part-Time Faculty* (visited Sept. 27, 1998) <[http://www.nyu.edu/law/faculty/part\\_time.html](http://www.nyu.edu/law/faculty/part_time.html)>; Northwestern University School of Law, *Adjunct Faculty* (visited Sept. 27, 1998) <<http://www.law.nwu.edu/comm/adj.fac.html>>.

59. *See* Northwestern University School of Law, *supra* note 58. Northwestern also employs five judges from the United States District Court for the Northern District of Illinois, as of the Fall 1998 semester. *See id.*

faculty members.<sup>60</sup> Yale Law School employs only twelve lecturers on its staff.<sup>61</sup> Similarly, Harvard Law School invites several lecturers for particular courses.<sup>62</sup>

Medical schools have seen a relative decline in the use of part-time faculty. These schools use more unpaid volunteer faculty today than part-time faculty.<sup>63</sup> In 1951, medical schools used 3,933 full-time, 5,930 part-time, and 5,700 volunteer faculty.<sup>64</sup> By 1983-84, medical schools reported 56,564 full-time faculty, 9,864 part-time faculty, and 104,240 volunteer faculty.<sup>65</sup>

#### *D. Typical Difficulties Encountered by Adjuncts*<sup>66</sup>

Many part-timers complain that the role of teaching—and particularly undergraduate teaching—is being devalued. Research seems of more interest to full-time professors. As a full-time professor withdraws from teaching undergraduates in favor of research and publishing, an adjunct is hired to fill the position. The two-tiered system of part-time and full-time teachers has become customary.<sup>67</sup> It may seem as though the adjuncts complain about their colleagues'

60. See The University of Michigan Law School, *Adjunct Faculty* (visited Sept. 27, 1998) <<http://www.law.umich.edu/faculty/index.htm#adjunct>>.

61. See Yale Law School, *Faculty* (visited Sept. 27, 1998) <<http://elsinore.cis.yale.edu/lawweb/lawschool/facfp.htm>>.

62. See Harvard Law School, *Faculty Directory* (visited Jan. 29, 1999) <[http://www.law.harvard.edu/Academic\\_Affairs/faculty\\_Directory/visiting/index.html](http://www.law.harvard.edu/Academic_Affairs/faculty_Directory/visiting/index.html)>.

63. See WILLIAM G. ROTHSTEIN, *AMERICAN MEDICAL SCHOOLS AND THE PRACTICE OF MEDICINE: A HISTORY* 225 (1987).

64. See *id.*; Harold S. Diehl et al., *Medical School Faculties in the National Emergency*, 27 J. MED. EDUC. 23, 24 (1952).

65. See ROTHSTEIN, *supra* note 63, at 225; Anne E. Crowley et al., *Undergraduate Medical Education*, 252 JAMA 1525, 1525 (1984).

66. Compared with full-time faculty, the resources allocated to adjunct faculty are limited or altogether denied. However, it would be fruitless to discuss each resource, since allocation of some resources would not lead in any instance to a violation of rights or legitimate expectations of the adjunct faculty. This Part concentrates mainly on those difficulties an adjunct may encounter which could lead to a legal cause of action.

67. One set of commentators has noted it thusly:

Bifurcation along full- and part-time faculty lines appears to be symptomatic of a fundamental and insidious trend that has major consequences for the academic profession. The profession seems to be increasingly split into teaching and research tracks. At research and comprehensive universities, the emphasis on research leads full-time faculty to withdraw from undergraduate teaching to the extent that they can. The remaining vacuum must be filled, and it is filled substantially with part-time or temporary faculty or graduate teaching assistants. At the institutions we visited [as part of a study involved in this book], use of part-timers is heaviest in lower-division courses, while the tenure-track faculty concentrate on upper-division and graduate courses with release time for research.

Part-time faculty who are aspiring academics are excruciatingly conscious of the devaluation of teaching. They feel that they are treated as if they are "less educated and don't publish" and understand that "if you are going to be serious about [advancing in] your profession, you've got to move on." The full-time faculty, they reported, see part-timers as "worker bees," "housekeepers," or "migrant workers" and relegate them to a servile status. Some point out that they

lack of civility. On the other hand, their complaint may be seen as a failure of the institution to carry out its mission of teaching:

"We have written novels, published poetry, run theaters and performing arts centers. . . . We've done creative work of high quality."

[Part-timers] also noted their records of effective teaching, some for a considerable number of years. Still they realized that their institution would not provide them with any opportunity to fulfill their aspirations for a tenure-track position because they lacked a research background.

Intelligent, dedicated teachers who are committed to doing a job that badly needs doing become disillusioned and alienated by the almost total absence of rewards and security.<sup>68</sup>

This two-tiered system also prevents part-timers from participating in the governing of the institutions where they teach. Many part-timers complain that they are unable to provide input about improvements, textbooks, and materials; that no avenues exist for their participation.<sup>69</sup> Opportunities for professional growth and development, usually provided and compensated for full-timers, are rarely given to part-timers.<sup>70</sup> Deprived of a voice and a defined role, the adjunct's place in the institution is ambiguous at best.

### 1. No Assurance of Employment

In contempt of the significance the adjuncts hold in number and function, both administrators and full-time faculty have treated the adjuncts as teaching assistants.<sup>71</sup> Policies of many schools and treatment of adjuncts indicate this

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know teaching part-time is hurting their chances to find full-time positions.

GAPPA & LESLIE, *supra* note 47, at 193-194 (second alteration in original) (quoting unnamed faculty as part of a study).

68. *Id.* at 195-96.

69. *See id.* at 196.

Within departments, voting rights vary considerably, from full to pro rata to restricted to none. In some cases, senior faculty are well aware that part-time faculty could outvote them in key department decisions. Where part-time faculty do participate, it is voluntary, and the time they spend is not compensated except under very unusual circumstances.

*Id.*

70. *See id.* at 200.

71. The use of the term "assistant" is used to emphasize that the full-time faculty and administration have treated adjunct faculty so poorly that the full-time faculty, administration, and students think that the adjuncts are a teaching unit of lesser quality. Interestingly, many adjunct faculty members are at least as qualified to teach as the full-time faculty, but due to factors such as limited office space, support, equipment, communications problems with the university, the off-site teaching, and the distance from the physical location of the school, disrespect of the full-timers, the exclusion of adjuncts from the governance of departmental decisions, etc., adjuncts have been forced into a "class" of teachers that is below that of full-time faculty.

view.<sup>72</sup> Institutions use the adjunct as needed, often providing little or no security as to whether the adjunct will be asked to teach for an upcoming session.<sup>73</sup> Once the administration receives students' demands for classes, reflected through registration and class enrollments, the institutions hire adjuncts at the last minute or after the session has begun. On the other hand, some adjuncts who were expecting to teach are told the class did not make, so they are not needed.<sup>74</sup> In other instances, classes taught by full-time faculty may not "make," causing the adjunct to be "bumped" from teaching his or her class so that the full-time faculty member teaches the adjunct's class and maintains a full-time load.<sup>75</sup> Thus, the adjunct is left unemployed with no assurance of work in the future.<sup>76</sup> A legitimate expectation of reemployment leads to a more narrow interest protected by the Constitution with respect to property rights, discussed *infra* Part II.A.2.b.

## 2. No Orientation

To encourage strong personnel relations within an organization, new employees must be introduced to the organization and the organizational life operating within the entity.<sup>77</sup> Although the introduction may teach only technical details of organizational life, the attitudes and values of the institution are absorbed during this process.<sup>78</sup> Whether formal or informal, this introduction forms expectations and "a framework for . . . behavior and attitudes."<sup>79</sup> Employees receive information about their role, complementary roles, and reference groups.<sup>80</sup> Orientation provides the employee with an opportunity to "feel out" where his or her place will be within the workplace setting.

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72. The trend of using adjunct faculty as mere teaching assistants and the resulting demoralization is discussed in Jane Flanders, *The Use and Abuse of Part-Time Faculty*, ADE AND ADFL BULLS., Sept. 1976, at 49 (special joint issue of the Association of Departments of English and the Association of Departments of Foreign Languages).

73. This was described as the "low pay and 'fast hired, fast fired'" environment in Elinor Kelley Grusin & Barbara Straus Reed, *The Role of Part-Time Faculty in the Quality of Instruction*, JOURNALISM EDUCATOR, Winter 1994, at 15, 24.

74. See Gappa, *supra* note 4, at 4 ("When a course section fails to meet minimum enrollment standards[,] . . . part-timers are released to accommodate the change.").

75. See *id.* ("There is no security regarding continuous assignment; a part-time instructor is subject to being 'bumped' from a course, for which preparation has been done, if a full-time instructor has to be reassigned to that course in order to have a full schedule."); see also LESLIE ET AL., *supra* note 36, at 102 (noting the unpredictability of assignments from term to term and the likely, last minute, cancellation of classes).

76. See Flanders, *supra* note 72, at 49.

77. See LESLIE ET AL., *supra* note 36, at 81.

78. See generally LESLIE ET AL., *supra* note 36, at 81. Over time an organization develops a type of personality. This personality is the culmination of the individual personalities of those within an organization. A newcomer must either agree with the personality, or at least live with it, or the newcomer will have to endure a miserable experience. See *id.*

79. *Id.*

80. See *id.* Leslie identifies orientation as a crucial element of the personal relations process within an institution of higher education. See *id.*

Significantly, most colleges and universities provide no formal orientation for part-timers.<sup>81</sup> Sometimes a brief discussion regarding the policies and procedures of the institution is done at the departmental level during the prehiring interview.<sup>82</sup> Expectations and rules are also discussed, but information about the students or cues on teaching methods are generally absent.<sup>83</sup>

Several factors prevent the institution from providing an effective orientation program. Institutions hire at the department level, decentralizing the process with no coordination with other departments to assemble the faculty at the same time.<sup>84</sup> Constant turnover of adjunct faculty due to enrollments and concessions to full-time faculty make it difficult to plan in advance.<sup>85</sup> Last-minute hiring has created a wide-spread problem. Schools fail to compile the adjunct faculty until after the school session has begun.<sup>86</sup> Lack of communication channels frustrate efforts to assemble a session.<sup>87</sup> Adjuncts generally have no campus offices, mailboxes, or telephones. They cannot be contacted personally because they are normally off-campus and otherwise employed during working hours.<sup>88</sup> In short, administrations do not want to become involved in orientating the adjunct faculty. Administrators would rather the employees merely adapt.<sup>89</sup>

Not only are adjuncts generally excluded from the systematic initiation to organizational membership, "they can seldom recoup the loss."<sup>90</sup>

For most, part-time teaching is an isolated role in which meaningful social or professional contact with even departmental colleagues is rare or nonexistent. Indeed, competing responsibilities elsewhere, off-hours teaching assignments, and the burdens of preparation and student contact out of class—all help to isolate part-timers from campus life. Once the opportunity to provide a formal socialization experience is passed up, the chances appear slim for later efforts.<sup>91</sup>

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81. See David A. Harris & Michael H. Parsons, *Adjunct Faculty: A Working System of Development 7* (Dec. 1, 1975) (unpublished paper, on file with the Office of Educational Research and Improvement, U.S. Department of Education).

82. See LESLIE ET AL., *supra* note 36, at 81 (finding that this was the case with 69% of the adjunct faculty they interviewed for their study).

83. See Ronald Hoenninger & Richard A. Black, *Neglect of a Species*, *COMMUNITY JUNIOR C. J.*, Nov. 1978, at 25, 25.

84. Many adjuncts are hired by the departments within the university, but departments do not coordinate to establish a date when all potential adjuncts could attend an orientation.

85. See Gappa, *supra* note 4, at 4 (noting that three-quarters of institutions engage in this "bumping" procedure).

86. See Van Arsdale, *supra* note 13, at 196.

87. See generally LESLIE ET AL., *supra* note 36, at 83. Without mailboxes or telephones, a university would deem notification of a university orientation too arduous. See *id.* Ironically, it would also be the university's decision not to supply the communication channel.

88. See Leslie & Head, *supra* note 30, at 52 (citing problems such as communication, coordination, and control).

89. See Van Arsdale, *supra* note 13, at 196 ("Part-time faculty are a class apart from all other academic appointees. With gestures both overt and covert, both deliberate and unwitting, the university denies them the possibility of strong institutional bonding. Thereby, it begins to undermine their professional and personal dignity.").

90. LESLIE ET AL., *supra* note 36, at 82.

91. *Id.*



### 3. Lack of Benefits

Institutions rarely provide benefits to part-time faculty. Only 16.6% of part-timers receive subsidized medical insurance, 20% receive subsidized retirement plans, and 8.5% receive tuition grants for their children attending school where the part-timers teach.<sup>92</sup> In comparison, 97.4% of full-time faculty receive medical insurance, 93% receive retirement benefits, and 47.7% receive tuition grants.<sup>93</sup>

Adjunct faculty experience confusion and frustration over benefits for several reasons. First, when multiple part-time assignments equal or surpass a full-time load, part-timers believe they should receive benefits. When part-timers are given conflicting sets of requirements for eligibility, frustration grows. When a legislature imposes definitions and calculations of time bases that intentionally cut out part-timers, this kind of "logo-gerrymandering" hampers the attempts of all parties to find equitable solutions. The part-time faculty members who receive benefits do so mostly as a result of collective bargaining.<sup>94</sup>

### 4. Inequitable Compensation

"The three major wage patterns for part-time teaching are the hour rate, semester rate, and prorata based on a proportion of the full-time instructors' salary schedule."<sup>95</sup> The hourly pay pattern is generally the lowest of the three, with pro rata the highest.<sup>96</sup> The hour pay and semester pay are based on "credit" hours.<sup>97</sup> Pro rata pay is computed as a fraction of the current salary of a full-time instructor.<sup>98</sup> Hour and semester pay are the most widely used forms of compensation to adjunct faculty.<sup>99</sup>

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92. See GAPP & LESLIE, *supra* note 47, at 162-63 (citing 1988 statistics).

93. See *id.*

94. Courts and administrative agencies are often forced to label the part-time or temporary faculty members for purposes of determining collective bargaining units. See *infra* Part II.C. Both national and state labor relations statutes label these employees. On the national level, the National Labor Relations Board ("NLRB") must determine whether an employee is a "professional." 29 U.S.C. § 152(12) (1994) (defining "professional employee"). Congress prohibits the NLRB from deciding whether an employee unit is appropriate if the unit contains both professional and nonprofessional employees, without a majority of professionals voting for inclusion of the mixed unit. See *id.* § 159(b)(1); John F. Gillespie, Annotation, *Who Are Professional Employees Within Meaning of National Labor Relations Act* (29 U.S.C. § 152(12)), 40 A.L.R. FED. 25, §§ 29, 30, 35 (1978) (noting that in leading cases, the NLRB has found both part-time and adjunct faculty members "professional" employees). State statutes often make similar labeling distinctions. See *infra* Part II.C.

95. John Lombardi, *An ERIC Review: Salaries for Part-Time Faculty*, COMMUNITY C. REV., Jan. 1976, at 77, 78-79.

96. See *id.* at 79.

97. *Id.* at 78.

98. See *id.* at 83.

99. See *id.* at 77, 79.

The hour and semester forms of pay were developed when adjunct teaching was a "moonlighting" activity. Compensation was supplemental income.<sup>100</sup> The package included only nominal pay with fewer fringe benefits.<sup>101</sup> The use of adjunct faculty has changed, however. Many of these teachers now rely on their compensation as a primary means of support.<sup>102</sup> Some institutions have changed their philosophy regarding the use of adjunct faculty; however, while some still consider the use occasional, others utilize adjuncts to the greatest extent necessary to provide optimal institutional flexibility. Nonetheless, compensation remains disproportionate.<sup>103</sup> This disproportionality begs the question of equal protection in terms of compensation, discussed *infra* Part II.A.3.

### *E. Attitudes Toward Adjunct Faculty*

To the educator, tenure represents academic achievement and security. To the university, tenure represents a decades-long commitment of money and support. Supporters argue that tenure is necessary for the stability of institutions through long-term commitments. They argue further that tenure preserves academic freedom. Opponents argue that tenure is a relic that fosters deadwood, makes it difficult to terminate incompetents, and hamstrings an institution's flexibility in meeting a financial crisis. Tenured professors find themselves defending the system against administrators, part-timers, and legislatures.<sup>104</sup>

#### 1. Adjuncts from a University Prospective

Though often neglected, part-time instructors fill a much-needed place in higher education. The use of such instructors enables a college or university to offer and staff a multitude of short-term courses and programs that meet specific needs of the school. Administrators believe that utilizing adjunct faculty enables the institution to enjoy a great deal of flexibility while controlling costs in staffing and course offerings.<sup>105</sup> The two primary motivations behind hiring adjunct faculty members are flexibility and economic benefits.<sup>106</sup>

The flexibility of the adjunct is one of the most compelling reasons to hire this type of faculty member.<sup>107</sup> If the school finds a large demand for a particular

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100. See *Status*, *supra* note 14, at 36.

101. See *id.* at 35.

102. One writer noted that thousands of adjuncts "teach part-time to eke out a living and remain in the profession." Tim Spofford, *The Field Hands of Academe*, *CHANGE*, Nov.-Dec. 1979, at 14, 14.

103. See BILES & TUCKMAN, *supra* note 23, at 2-4, 40.

104. See *Status*, *supra* note 14, at 29-33.

105. See generally Van Arsdale, *supra* note 13, at 197.

106. In any other profession, the administrators would have to pay a premium to keep employees "on call." In higher education, administrators get to enjoy flexibility and low wages because there are many adjuncts looking for work. The administrators believe they can do this because the supply of adjunct faculty is high and the demand is low.

107. Cf. Flanders, *supra* note 72, at 49 ("Despite the euphemistic explanation that employing part-timers brings 'flexibility,' the practice really means the exploitation of a depressed job market . . . in order to cut costs, to respond quickly to fluctuations in enrollment, and to evade

class, then the school can rely on an adjunct to teach it.<sup>108</sup> This attitude is facilitated by the fact that an adjunct is willing to teach at a time and location that a regular full-time faculty member would never consider.<sup>109</sup> Institutions may respond to a demand for more classes because the adjunct's wage is low enough to fit into the budget.

Adjunct faculty members can offer an institution up-to-date skills and knowledge lacking in one full-time faculty member. Consequently, it becomes much more logical and economically sensible to fill several different needs by hiring several different part-time instructors.<sup>110</sup> It makes little sense for an institution to hire a single full-time faculty member lacking a usable range of skills to fill one particular position. It becomes expensive when an institution hires inappropriately in every department. A more selective and tentative commitment to part-timers allows an institution to minimize the large overhead and heavy capital investment involved in employing an exclusively full-time faculty.<sup>111</sup>

## 2. Tenure and the Two-Tiered System

The tenured faculty members contend that the quality of instruction students receive from adjunct faculty is below par. Full-timers are concerned that the required courses which typically make up a large part of first and second-year students' curriculum—the foundation upon which their upper division classes rest—are not taught by sufficiently qualified faculty. Full-time faculty are also concerned with the lack of preparation shown by students entering upper division courses. The fault lies, they claim, with the large number of part-time faculty teaching these essential classes.<sup>112</sup>

Full-time faculty are harmed by the increased reliance on part-timers. In many cases, departments are left with only a few full-time faculty members. "Letting attrition of full-time faculty be driven by budget stringency forces de facto

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the regulations governing promotion and tenure.").

108. This is another situation which would call for higher pay in any other profession.

109. See Flanders, *supra* note 72, at 49 ("Part-time faculty are frequently given the most thankless tasks, difficult hours, and unpopular class locations . . .").

110. Cf. Anderson, *supra* note 57, at 8 ("[Part-time faculty members] get little or no financial reward for the life experience that has equipped them with special skills.").

111. See *Tenure*, *supra* note 15, at 1 ("Critics of the tenure system argue that tenure protects unproductive faculty members and reduces the flexibility of institutions to respond to financial downturns as well as the changing demands of students.").

112. See LESLIE ET AL., *supra* note 36, at 139.

We are disturbed to note that the use of part-time faculty is often associated with patterns that may be antithetical to high-quality instruction as we are defining it. Little control seems to be exercised over the intrinsic characteristics of part-timers chosen to assume teaching duties. Availability and minimal qualifications often assume greater importance in the decision to hire than do special personal or professional characteristics which might produce an outstanding—rather than a merely competent—teacher.

*Id.*

decisions about what work will be done and what work—advising, program development, and governance, for example—will not be done.”<sup>113</sup>

Full-time students are concerned that part-timers may not keep up with new developments in their teaching fields. They have concerns about the instruction, testing, and grading methods of adjunct faculty.<sup>114</sup> Full-time faculty may harbor resentment of the adjuncts for a variety of reasons, such as the additional workload full-timers have to bear and the adjuncts’ lack of availability to students.<sup>115</sup> Additionally, when an adjunct is unable to complete the teaching assignment, it usually falls to a full-time faculty member to finish the assignment. Full-timers see signs that hiring adjuncts erodes the tenure system.<sup>116</sup> Multiple adjuncts sometimes fill the position of a retiring professor, and adjuncts outnumber full-time faculty at some institutions. This increased use of part-timers results in academic instability.<sup>117</sup> Tenured faculty positions are increasingly

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113. GAPP & LESLIE, *supra* note 47, at 94-95.

114. See LESLIE ET AL., *supra* note 36, at 139.

Many express concern that part-timers are less inclined to use the research paper as a learning tool. Part-timers do not have enough time or real incentive to read and evaluate 20 to 30 papers, and turn to other implicitly less demanding means of evaluating student performance.

Department chairpersons share these same concerns, especially in the case of graduate courses. They recognize some problems in assuring adequate continuity of instruction leading up to those important comprehensive exams. They also find that part-timers often do not seem to have the time to serve effectively on doctoral committees.

*Id.* at 134.

115. See *id.* at 134-35.

Part-timers’ lack of involvement in nonteaching duties has added significantly to the workload of full-time faculty. Full-timers normally carry a teaching load of three courses. They have the option to pick up additional courses on an overload basis but at part-time-faculty rates. Most find this an unattractive option. Their advisory and dissertation workloads, their research activities, their committee assignments, and other considerations preclude their teaching the overload courses. In part, the low wage offered is an insufficient inducement, but time constraints are generally viewed as more pressing deterrents. Full-timers bear the load of advising, supervising graduate students, coordinating core courses, and performing the normal departmental and college maintenance activities. In some departments, especially those which rely on large numbers of part-timers, the ratio of students to full-time faculty is very high. The load of essential departmental work on full-time faculty is heavy enough for some so that overload wages are paid. Those with a full course overload are paid (at part-time rates) for advising 60 to 80 extra students.

*Id.* at 135.

116. See *Report, supra* note 39, at 39 (“For higher education as a whole, the growing use of non-tenure-track faculty members, part-time and full-time, undercuts the tenure system, severs the connection between control of the curriculum and the faculty who teach it, and diminishes the professional status of all faculty members.”).

117. See *id.*

The growth of an underclass of part-time faculty has often come at the cost of stable employment for those who seek full-time careers. Institutions which assign a significant percentage of instruction to faculty members in whom they make a

vulnerable to being reclassified as non-tenure-track positions with renewable contracts.<sup>118</sup>

However, many tenured faculty members may not have recognized the symbolic relationship that has developed in this two-tiered system. The cost saving use of part-time faculty may be what sustains the continuation of the tenure system.<sup>119</sup> More than half of full-time faculty members surveyed in a 1996 study supported tenure as essential to attract the best minds to academia.<sup>120</sup> The number of full-timers agreeing that tenure is an outmoded concept was less than forty percent.<sup>121</sup> However, of the females polled, a slightly larger number supported the latter statement rather than the former.<sup>122</sup> Regardless, the fact that opinions vary so radically on the tenure issue perhaps illustrates the need for a better system.

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minimal professional investment undercut their own commitment to quality. Academic programs and a tenure system are not stable when institutions rely heavily on non-tenure-track faculty who receive few if any opportunities for professional advancement, whose performance may not be regularly reviewed or rewarded, and who may be shut out of the governing structures of the departments and institutions which appoint them. The tendency to use more part-time faculty to meet enrollment pressures in basic courses also makes the academy more vulnerable to critics who charge that universities pursue research at the expense of teaching.

*Id.*

118. *See id.* at 43-44.

Recent studies indicate that some tenure-track faculty are being moved to non-tenure-track positions. This shift is especially prevalent in medical colleges and other areas in which clinical and research faculty are employed. Numerous institutions have moved toward the use of five-year renewable contracts to replace tenure-track appointments for faculty members who are not primarily classroom teachers . . . . The growth of outside grants to fund research has also produced an increasingly large number of faculty members whose appointments are tied to the duration of the grant and who are not eligible for tenure in their institutions.

*Id.* (citation omitted).

119. *See* GAPPA & LESLIE, *supra* note 47, at 2.

The reason for the two faculties is that one sustains the other: the low costs and heavy undergraduate teaching loads of the have-nots [part-timers] help make possible the continuation of a tenure system that protects the jobs and perquisites of the haves [tenured faculty]. Because tenured faculty benefit directly and personally from this bifurcation of the academic profession, they have a vested interest in maintaining it.

*Id.*

120. *See Attitudes and Activities of Faculty Members, 1995-96*, CHRON. HIGHER EDUC., Aug. 29, 1997, at 29. Of 33,986 responses of full-time faculty members at 384 colleges and universities, 54.3% agreed strongly or somewhat that "[t]enure is essential to attract the best minds to academe." *Id.* The percentage agreeing was substantially higher at public and private universities (62.2% and 63.0%, respectively), than at other four-year colleges and two-year colleges (55.9% at public four-year colleges; 50.5% at private four-year colleges; and 44.2% at public two-year colleges). *See id.*

121. *See id.* The total poll showed 38.3% agreeing with the statement that tenure is an outmoded concept. *See id.*

122. *See id.* The number of men supporting tenure was 58.8%, compared to 34.6% who felt it was outmoded. Of the women polled, 45.8% thought tenure was outmoded, compared to 45.3% who thought it was necessary. *See id.*

Legislatures have exerted additional pressure to redefine the tenure system or do away with it altogether.<sup>123</sup> Some states are moving toward a limited tenure or renewable tenure.<sup>124</sup> Some states call for periodic evaluation of tenured faculty.<sup>125</sup> Recently, the National Education Association has softened its hard line on tenure:

[A]t its annual meeting [in 1997] in Atlanta, the union voted to drop its opposition to the practice by which teachers help administrators to identify and, potentially, oust incompetent colleagues—a step widely viewed as making removals more likely. And in interviews, the union's leaders have been taking a new line: maybe tenure is negotiable after all.

Why the shift? The union is said to be trying to control anti-tenure momentum in state capitals. Last week Oregon lawmakers voted to scrap that state's tenure law in favor of renewable contracts of two years for teachers and three years for administrators.<sup>126</sup>

123. See Denise K. Magner, *U. of Texas, with an Eye on the Legislature, Starts a System of Post-Tenure Reviews*, CHRON. OF HIGHER EDUC., Dec. 20, 1996, at A10 ("[D]espite faculty opposition, the regents voted to require professors to undergo 'post-tenure' reviews every five years, beginning next fall."). Institutions in Colorado, Kansas, Virginia, and Minnesota have also opted for periodic reviews for tenured professors. See *id.*

Administrators insist that these new evaluation processes do not weaken tenure, and, ideally, could help some struggling faculty members. But professors dismiss post-tenure review as a public-relations gambit at best, and at worst as an attempt to turn the lifetime security of tenure into a system of multiyear contracts.

*Id.*

However, some professors do "concede that the university has not done a very good job of handling what they say are the very few cases of 'deadwood' professors. Some faculty members say that when they have complained about a colleague's performance, administrators have been reluctant to act, out of fear of prolonged litigation." *Id.* Some professors believe that the Texas "chancellor made a deal with lawmakers: The Texas system would adopt post-tenure review in return for a chunk of the state's expected \$2-billion surplus this year." *Id.* The provost disagreed: "There's no complicated, dark plot here . . . It's no accident that post-tenure review seems to be arising all over the country. The chancellor thought it was wise to make a pre-emptive strike before the Legislature acted." *Id.*

124. See *id.* at A10.

125. See *id.*

126. Walter Olson, *Time to Get Off the Tenure Track*, N.Y. TIMES, July 8, 1997, at A1 [hereinafter Olson, *Time to Get Off*]. Olson's latest book, WALTER OLSON, THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE (1997), is unsurprisingly critical of the tenure policies of public schools and universities. He cites some appalling examples of tenured teachers who could only be ousted from their jobs by years-long effort. See *id.* at 161-64, 172; cf. *id.* at 202-04 (discussing discrimination laws which make it difficult to dismiss teachers).

The shift by the teachers' union may clear the way for a long overdue rethinking of our teacher-tenure laws. But unless we also rethink the way we've been drifting toward a culture of tenure for 'regular' employees under 'wrongful firing' legal doctrines and enactments like the disabilities act, we may find that problem educators can simply resort to other legal strategies to hold on—while children pay the price.

Olson, *Time of Get Off*, *supra*, at A1. Olson's first book was WALTER K. OLSON, THE LITIGATIONS EXPLOSION: WHAT HAPPENED WHEN AMERICAN UNLEASHED THE LAWSUIT (1991). Olson uses examples of employers' inability to fire employees for outrageous conduct much the way tort reformers use the McDonald's "hot coffee case" as an example of abuse of the

### 3. Professional Educators' Viewpoints

The American Association of University Professors ("AAUP") urges universities to limit the hiring of part-time professors. The AAUP recommends that all appointees be tenured or on tenure-track. Citing the erosional effect of increased part-time faculty on academic standards, the AAUP advocates the limited use of adjunct professors.<sup>127</sup> Among the many concerns, the Association urges the responsibility for the education of such a large number of undergraduates should never rely on those educators who have no real stake in the institution. Adjunct faculty, according to the AAUP, are not hired based on teaching ability, nor are adjuncts evaluated regularly. "Only when the exploitative use of non-tenure-track faculty becomes a more expensive and damaging factor for the quality of the institution than a budgetary advantage can we expect the picture to change."<sup>128</sup>

The American Federation of Teachers ("AFT"), in its *Statement on Part-Time Faculty Employment*, discussed the need for educating academics about the problems of part-timers and the impact part-timers have on students.<sup>129</sup> The AFT saw the exploitation of part-timers as the main problem.<sup>130</sup> In 1977, 1979, and

state tort laws. *Id.* at 214.

127. *See Report, supra* note 39, at 46.

The AAUP holds that all full-time faculty with few exceptions should be either probationary or with tenure, regardless of rank or degree held. Institutions which rely heavily on non-tenure track faculty members to teach undergraduate students undermine the institution's respect for teaching and the reputation of higher education in the larger society. Institutions exploit faculty members when they appoint numerous part-timers in a single department or renew 'temporary' faculty members year after year without offering them raises in pay, access to benefits, opportunities for promotion, or eligibility for tenure.

*Id.* Although the AAUP allows for part-time appointments when unexpected increases in enrollment happen in a particular course during a particular term, it urges an end to the "habitual" use of part-timers. *Id.*

128. *Id.*

129. *See* PERRY ROBINSON, AMERICAN FED'N OF TEACHERS., PART-TIME FACULTY ISSUES 5 (1994) (citing AMERICAN FED'N OF TEACHERS., 1979 STATEMENT ON PART-TIME FACULTY EMPLOYMENT).

130. *See id.* at 47. In its 1979 Statement, the AFT stated:

We reject the argument that the "part-time problem" is the inadequacy of part-time teachers themselves; rather, it is their exploited status which lies at the root of the problem. Nonetheless, an unfair two-layer employment situation does have detrimental effects on students. Alienated and demoralized teachers, always conscious of their vulnerability, cannot bring into the classroom the confidence and creativity necessary for the best teaching. Instructors called up at the last minute, using someone else's choice of texts, cannot do their best work. Teachers unable to plan for the future are less effective in courses designed to follow in sequence. Uninformed of departmental/institutional policies and procedures, part-time faculty cannot serve as liaisons between the student and the institution. They are less able to advise students, even though they often teach courses largely subscribed by part-time students and/or students with learning and literacy disabilities—that is, students with the greatest need for well-informed instructors

1980, AFT Conventions passed resolutions on the use of adjunct faculty.<sup>131</sup> Although more than twenty years have passed since the 1977 resolution, it must be questioned whether any substantial change in the use or abuse of part-time faculty has occurred.

## II. LIMITED LEGAL REMEDIES

### *Introduction*

The legal response to the dilemma of the adjunct professor may be described as limited at best. Problems encountered by adjunct professors vary with the individual adjunct. With the broad range of problems faced, the theories for legal redressability are broad as well. Some adjuncts have argued that their causes are protected by the constitution, although these arguments have not had a great deal of success.<sup>132</sup> Similarly, other adjuncts have argued for protection under collective bargaining agreements or individual agreements under employment contracts with the schools. Many of these arguments rely heavily on the particular agreement in question.<sup>133</sup>

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who are fully privileged members of the institution. In short, "deprofessionalized" faculty can hardly serve as professional role models for their students.

*Id.* (quoting AM. FED'N OF TEACHERS. ADVISORY COMMISSION ON HIGHER EDUC., STATEMENT ON PART-TIME FACULTY MEMBERS (1979)). Although this was written nearly 20 years ago, the concerns and perceptions are precisely the same today.

131. *See id.* at 49.

#### 24. Use of Part-Time or "Adjunct" Faculty

WHEREAS, recent studies suggest that the use of part-time, non-tenure-track and/or hourly paid or "adjunct" faculty is rapidly increasing; and

WHEREAS, such faculty are all too often paid at rates ranging down to one-third or less of established salary scales, are not provided with any benefits, and are not accorded the protections of seniority, due process, or peer review; and

WHEREAS, the exploitative use of such faculty both abuses such professionals and undermines the contracts, salaries, and professional standards of full-time faculty;

RESOLVED, that the American Federation of Teachers shall establish a Task Force on Part-Time College and University Faculty whose responsibility it shall be to develop and present to the Executive Council a plan for eliminating abuses of part-time non-tenure track and/or hourly paid or adjunct faculty and for the more rapid organization of part-time non-tenure track and/or hourly paid or adjunct college and university faculty; and

RESOLVED, that this Task Force will contain, within its membership, a representative number of such part-time non-tenure-track and/or hourly paid or adjunct faculty. (1977)

*Id.*

132. *See infra* Parts II.A.2-3.

133. The difficulty in discussing legal remedies for adjunct professors as a collective occurs because many of the cases decided in favor of the adjunct hinged on a particular agreement or particular actions by the individual school. This Article cannot indicate a particular legal remedy for which an adjunct may seek protection. At this point, it may suffice to note that a practitioner may advance a variety of theories to protect the adjunct's interest. Each of these



The courts and state and federal agencies can provide some remedies for adjunct professors. The remedies available hinge in large part on whether the particular school is a state or private school. The Fourteenth Amendment of the United States Constitution will provide some protection against denials of due process of law or equal protection of the laws.<sup>134</sup> The State Action Doctrine limits such constitutional protection to state actors.<sup>135</sup> Adjuncts at private colleges, as well as adjuncts at public schools, may seek remedies through collective bargaining. The status of an adjunct at a particular setting will often determine the remedies available, depending on whether a state or private school employs the adjunct.<sup>136</sup>

Compensation in the form of pay and fringe benefits gives rise to legal and political issues. The major claim of adjunct faculty members relates to pro rata pay, or "equal pay for equal work." Fringe benefits include, but are not limited to, pension plans, disability income plans, and various types of leave, as well as life and health insurance, educational benefits, cafeteria benefits, and parking privileges.

"Unit determination" is a labor-relations term referring to the process for determining whether a group of employees should be included or excluded from a legally constituted collective bargaining unit.<sup>137</sup> The principle involved to determine inclusion or exclusion is that of a "community of interest."<sup>138</sup> This collective bargaining term signifies a similarity or mutuality of interest among employees within a group or between two or more persons, such that they can all be incorporated within a single bargaining unit.<sup>139</sup>

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theories, however, will face varying degrees of opposition in court depending on the adjunct's situation. The limited nature of the legal remedies may indeed add to the adjunct's dilemma.

134. U.S. CONST. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Id.*

135. The Supreme Court has interpreted the phrase, "[n]o State shall make or enforce any law," as requiring the action taken to be one attributable to the state. *See generally* Lugar v. Edmundson Oil Co., 457 U.S. 922, 924 (1982) (holding that the conduct of private persons may be considered state action if the conduct is aided or abetted by state officials). The application of the State Action Doctrine to determine whether a school is public or private is discussed *infra* Part II.A.1.

136. Status here refers to the statutory and contractual classification of employees within an institutional setting. In short, to show that employees have the classification required to show a property right to their positions, the employees must show authority for such by state law, institutional regulation, or contractual agreement. They must also demonstrate continuous service of a substantial nature.

137. *See infra* note 303.

138. *See infra* note 303.

139. *See infra* note 303.

Contractual agreements will provide some remedies, depending on the particular agreements. Many of these remedies hinge upon legal recognition of a particular contract, whether the court decides to incorporate an employee manual into the employment contract or recognize an oral agreement as binding. Equitable remedies, such as promissory or equitable estoppel, have not been advanced with success. The contract may, nonetheless, provide the better protection for an adjunct because it will involve an individual agreement between the school and the adjunct.

*A. Fourteenth Amendment Protection of Due Process and  
Equal Protection*

1. The State Action Doctrine and Constitutional  
Protection

The protections provided under the Fourteenth Amendment apply only to an action by a governmental entity.<sup>140</sup> Thus, a privately owned and operated college or university is most likely not bound by Constitutional provisions.<sup>141</sup> The question of whether a college or university is a state actor is partially dependent on whether the institution is controlled by the state government or a private entity.<sup>142</sup> No question arises as to whether a state university is bound by the Fourteenth Amendment, for such a university is clearly a state actor.<sup>143</sup>

Questions may arise when the government exercises some control or has developed some relationship with the college or university. The Supreme Court developed a series of tests to determine whether an actor is indeed a state actor.<sup>144</sup>

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140. See *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988) ("Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be."); see also *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

141. See *Blum v. Yaretsky*, 457 U.S. 991, 1010-12 (1982) (noting that even where a nursing home received substantial government funding, the Fourteenth Amendment's due process principles do not apply to such a private entity).

142. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) ("That a private entity performs a function which serves the public does not make its acts state action.").

143. See *Tarkanian*, 488 U.S. at 192 ("A state university without question is a state actor. When it decides to impose a serious disciplinary sanction upon one of its tenured employees, it must comply with the terms of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.").

144. These include (1) the "public function" test, where the court looks at whether the entity performs a traditional public function; (2) the "state compulsion" test, where the court looks at the regulation with respect to influence or potential coercion by the government over the actor; and (3) the "nexus/joint action" test, which involves "situations where the government has so far insinuated itself into a position of interdependence with the [private party] that it was a joint participation in the enterprise." See *Nobles v. Alabama Christian Academy*, 917 F. Supp. 786, 788 (M.D. Ala. 1996) (quoting *NBC v. Communications Workers*, 860 F.2d 1022, 1026 (11th Cir. 1988) (alteration in original) and discussing the application of these tests under

With respect to whether a private school is a state actor, the Supreme Court's decision in *Rendell-Baker v. Kohn* has served as a much-cited basis for the conclusion that a private school is probably not a state actor.<sup>145</sup> In *Rendell-Baker*, a private school discharged five employees for disagreeing with school policy. The school received "virtually all" of its funding from the state.<sup>146</sup> The Court rejected the contention that the school was a state actor,<sup>147</sup> as well as the argument that the private school and the government had become joint actors.<sup>148</sup> The Court also rejected the claim that the school performed a "public function" to make the school a state actor.<sup>149</sup> A remaining issue was whether the school was a state actor due to any "state compulsion." Although the state exercised extensive regulation of the school, its regulations were not so coercive as to make the school's actions those of the state.<sup>150</sup>

Under *Rendell-Baker*, it appears unlikely that a private school would be considered a state actor under the Constitution. However, this is not always the case. In *Braden v. University of Pittsburgh*,<sup>151</sup> and again in *Krynicky v. University of Pittsburgh*,<sup>152</sup> the Third Circuit found that the University of Pittsburgh and, by implication, Temple University, were state actors.<sup>153</sup> *Braden* was decided five years before *Rendell-Baker*. The plaintiff in *Krynicky*, a teacher who was denied tenure at the University of Pittsburgh, argued *Rendell-Baker* and *Blum* would

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the Eleventh Circuit's analysis, which mirrors the Supreme Court's analysis).

145. 457 U.S. 830, 839-43 (1982).

146. *Id.* at 840.

147. *See id.* The Court noted the touchstone question: "Is the alleged infringement of federal rights 'fairly attributable to the State?'" *Id.* (quoting *Lugar v. Edmundson Oil Co.*, 457 U.S. 922 (1982)).

148. *See id.* at 841. The Court found the fiscal relationship between the school and the state was insufficient to make the school a state actor. The Court noted the similarity between this relationship and one involving a state and a private contractor.

149. *See id.* at 842. The Court did not simply determine whether the school served a "public function." The Court elaborated, noting the question is whether the function performed "has been traditionally the exclusive prerogative of the State." *Id.* (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982) (emphasis in original) (quoting in turn *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974))). Massachusetts's legislative policy indicated education was not an "exclusive province" of the state. *Id.* A private school performing such a function is not within an exclusive prerogative of the state to make the school serve a "public function." *Id.*

150. *See Rendell-Baker*, 457 U.S. at 840 ("[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.") (quoting *Blum*, 457 U.S. at 1004).

151. 552 F.2d 948 (3d Cir. 1977).

152. 742 F.2d 94 (3d Cir. 1984).

153. The Commonwealth of Pennsylvania had enacted the Temple University-Commonwealth Act, PA. STAT. ANN. tit. 24, §§ 2510-1 to -12 (West 1992), and the University of Pittsburgh-Commonwealth Act, PA. STAT. ANN. tit. 24, §§ 2510-201 to -211 (West 1992). The decision in *Braden* hinged on the relationship between the Commonwealth and the University of Pittsburgh. The relationship was established through the legislative act. Thus, a decision that the University of Pittsburgh was a state actor due to this relationship would deem Temple University a state actor as well, due to the similar statute establishing the relationship between Temple and the Commonwealth.

overturn the decision of *Braden*. The Third Circuit disagreed. Instead, the court determined that the Commonwealth and the University had a “symbiotic relationship.”<sup>154</sup> The actions of the University were thus done under the color of state law due to this relationship.<sup>155</sup>

*Krynicky* perhaps illustrates an exception to a more general rule that a private college or university is not bound by the Fourteenth Amendment.<sup>156</sup> The absence of constitutional protection limits the remedies of an adjunct faculty member at a private college or university.<sup>157</sup> The Constitution will protect the adjunct faculty member at a public institution from being denied due process or equal protection, but even these protections are limited.

## 2. The Real Problem—Lack of Due Process

### a. The Protection Provided By the Due Process Clause

By the language of the Fourteenth Amendment, a state cannot deprive “any person of life, liberty, or property, without due process of law.”<sup>158</sup> The Due Process Clause provides diverse protection under judicial interpretation.<sup>159</sup> Procedural safeguards embedded in the clause provide adjuncts or other temporary employees with possible protection against dismissals without cause or pretermination hearing. Procedural due process requires the institution to give

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154. *Krynicky*, 742 F.2d at 103.

155. See 42 U.S.C. § 1983 (Supp. II 1996). Section 1983 prohibits acts or omissions done under the color of state law. *Id.* The Supreme Court uses the same analysis for determining if an act is under the color of state law as it does under the State Action Doctrine. See *Rendell-Baker*, 457 U.S. at 843. This Article does not examine employment discrimination under the Civil Rights Act, or other federal statutes, such as the Age Discrimination in Employment Act under Title VII. Were a situation to arise where an adjunct was denied a job or released due to discrimination, the analysis for determining whether the school acted under the color of state law would be the same as determining whether the school was a state actor.

156. The purpose of this discussion is not a detailed analysis of the State Action Doctrine. For a more detailed discussion of the State Action Doctrine, see G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333 (1997), and Henry C. Strickland, *The State Action Doctrine and the Rehnquist Court*, 18 HASTINGS CONST. L.Q. 587 (1991).

157. Remedies may be afforded through such means as state statutes, contractual provisions, and collective-bargaining agreements. These remedies are discussed *supra* Part II.A.1, and *infra* Parts II.B.1, II.C.1, II.C.3.

158. U.S. CONST. amend. XIV, § 1.

159. See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.1 (5th ed. 1995) (discussing the substantive and procedural limitations the Due Process Clause places on government action). The interpretation of the Due Process Clause divides the interests protected into substantive and procedural due process. Substantive due process protects the denial of certain fundamental rights or limitations on individual freedom of action. Such protections may apply to individual professors, but will not apply to adjuncts collectively.

notice, plus an opportunity to be heard and participate in a hearing.<sup>160</sup> An institution complying with the Due Process Clause must at least give a terminated employee a notice of the termination and an opportunity to voice an objection. "The fundamental requisite of due process of law is the opportunity to be heard."<sup>161</sup> Before receiving such protection, the adjunct must first have acquired a recognized property interest in the position protected by the Constitution.<sup>162</sup>

b. Defining Property Interest Through  
Status; *De Facto* Tenure<sup>163</sup>

Institutions generally employ three classes of faculty members: permanent, probationary, and temporary. The classification of the faculty member's status will bear on whether the faculty member has a property right to his or her employment. An adjunct would prefer to be classified as permanent or probationary. Such classifications implicitly provide a property right due to an expectancy of reemployment.<sup>164</sup> Nevertheless, a temporary adjunct employed continuously for a long period of time through a series of short-term contracts may establish a legitimate expectation of reemployment.<sup>165</sup> Such an expectancy of reemployment will provide a constitutionally protected property interest for the

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160. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("The notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'") (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)).

161. *Mullane*, 339 U.S. at 314 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

162. See NOWAK & ROTUNDA, *supra* note 159, § 13.5(d). Courts look to whether a person can be deemed to be "entitled" to a governmental benefit for the person to have a property interest in the benefit. As discussed *infra*, Part II.A.2.b, the courts have created a dichotomy between such an entitlement and a subjective expectancy of employment. If an adjunct or temporary faculty member has a right to further employment, or a valid expectancy of employment, then he is "entitled" to future employment. Thus, the adjunct has a property interest in future employment. See also Robert Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60 (1976).

163. As discussed in this Part, *de facto* tenure exists due to the facts of the case, although the method of acquiring such tenure may contradict the formal requirements of the institution. *De jure* tenure will arise through the recognized procedures for acquiring tenure. Such *de jure* tenure will most likely create the property interest through entitlement due to the nature of tenure, since tenure carries a guarantee that an employee will not be dismissed without cause. Thus, a tenured professor will have a legitimate claim of expectation of reemployment, which creates the property interest.

164. Local law will determine whether a person is "entitled" to his or her job. The classification of permanent or probationary will most likely create such entitlement and a property interest protected by due process. See *Arnett v. Kennedy*, 416 U.S. 134, 166 (1974). However, the state may also define the terms of what appears to be permanent employment, which may strip the procedural safeguards protecting termination. See *Bishop v. Wood*, 426 U.S. 341, 345-46 (1976).

165. See LESLIE ET AL., *supra* note 36, at 42.

adjunct, because the adjunct will be entitled to reemployment.<sup>166</sup> Procedural due process protects such a property interest.<sup>167</sup>

Showing an expectancy of reemployment is not a test of subjective expectancy to tenure or rehiring. Policies and actions by the institution may create such an expectancy, as illustrated under the Supreme Court's analysis in *Perry v. Sindermann*.<sup>168</sup> Sindermann taught for ten years in the state college system in Texas. He spent the last four years under successive one-year contracts at Odessa Junior College. Sindermann made disparaging remarks about the school's Board of Regents.<sup>169</sup> The following year, the board refused to renew Sindermann's contract. The board offered Sindermann no hearing to challenge the decision, nor were any reasons for the decision given to him.

The faculty guide of Odessa Junior College noted that no tenure system existed. The guide indicated "the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory."<sup>170</sup> The Court held the lack of a tenure system, taken alone, did not defeat Sindermann's claim that his constitutional rights were violated. The Court found that Odessa's official policies clearly expressed the spirit of tenure, and such *de facto* tenure entitled Sindermann to procedural due process. The Court held that while a subjective "expectancy" to tenure is not protected by procedural due process, the *de facto* tenure arising from rules and understandings officially promulgated and fostered, entitled Sindermann to an opportunity of proving the legitimacy of his claim to a property interest in continued employment.<sup>171</sup>

The Court noted constitutionally protected property interests "are not limited by a few rigid, technical forms."<sup>172</sup> The term "'property' denotes a broad range of interests that are secured by 'existing rules or understandings.'"<sup>173</sup> The absence of tenure provisions, the Court continued, does not necessarily "foreclose the possibility that a teacher has a 'property' interest in re-employment."<sup>174</sup> Though

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166. A teacher's "long employment in a continuing relationship through the use of renewals of short-term contracts was sufficient to give him the necessary expectancy of reemployment that constituted a protectible interest." *Lucas v. Chapman*, 430 F.2d 945, 947 (5th Cir. 1970); see also *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970) (holding that the denial of re-employment rights based on plaintiff's classroom remarks was unconstitutional); *Pred v. Board of Pub. Instruction*, 415 F.2d 851 (5th Cir. 1969) (noting that an instructor who has an expectancy of continued employment may not be denied it without due process).

167. See *Perry v. Sindermann*, 408 U.S. 593, 599 (1972).

The Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show that the decision not to rehire him somehow deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite a lack of tenure or a formal contract.

*Id.*

168. 408 U.S. 593 (1972).

169. Sindermann alleged violation of First Amendment free speech rights. See *id.* at 595. This discussion is limited to the procedural due process claim.

170. *Id.* at 600 (quoting the Odessa College Faculty Guide).

171. See *id.* at 603.

172. *Id.* at 601.

173. *Id.* (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

174. *Id.* (quoting *Roth*, 408 U.S. at 577 (1972)).

faculty members may not allege a subjective expectancy of reemployment, the teachers may prove through surrounding facts and circumstances they have acquired *de facto* tenure:

A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure. . . . This is particularly likely in a college or university, like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice.<sup>175</sup>

The *Perry* court clarified the protection afforded under procedural due process. “Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency.”<sup>176</sup> While faculty members protected by due process may not receive the precise remedy they seek, such as reinstatement, due process does obligate the school’s officials to grant a hearing at the employee’s request. Such protection at least provides the aggrieved faculty member notice of his dismissal and an opportunity to dispute it.

Though *Perry* provides a window for constitutional protection, its extent is clearly limited. An adjunct faculty member classified as temporary will not likely be in the position to present an effective *de facto* tenure argument. The employer school more often will have a tenure system in place, or the school’s practice will not create *de facto* tenure for an adjunct faculty member. Where an adjunct is classified as temporary, *de facto* tenure under *Perry* may never exist, for the school dispels any show of intent to maintain the employment of the temporary employee indefinitely. *Perry* does, however, provide a basis for some adjuncts to prove the existence of a recognized property interest through expectancy of reemployment.

The companion to the *Perry* case, *Board of Regents v. Roth*, defined the property interest protected by the Fourteenth Amendment.<sup>177</sup> *Roth* also illustrates the difficulty a temporary faculty member may have in proving acquisition of a property interest. In *Roth*, a nontenured assistant professor of political science at a branch of Wisconsin State University was discharged after his one year term of employment expired. Wisconsin law entitled him to nothing beyond that term of employment. The decision to terminate his employment was completely left to the discretion of the University. Roth claimed he was denied procedural due process.<sup>178</sup>

The Court rejected the district court’s balancing of the weights of Roth’s interest and the University’s interests. The Court noted “to determine whether due process requirements apply in the first place, we must look not to the ‘weight’ but

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175. *Id.* at 602.

176. *Id.* at 603.

177. 408 U.S. 564 (1972). The Court first decided *Roth*, then applied its decision later the same day in *Perry*.

178. *See id.* at 566-67.

to the *nature* of the interest at stake.”<sup>179</sup> The Court maintained that property interests “are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.”<sup>180</sup> The Fourteenth Amendment’s protection of property safeguards “the security of interests that a person has already acquired in specific benefits.”<sup>181</sup> Due process does not protect every interest, claim, or expectation. “To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”<sup>182</sup> The *Roth* majority suggested such entitlement exists where a tenured professor is dismissed or a nontenured professor is discharged during the term of his contract.<sup>183</sup>

Roth, unlike Sindermann, did not have a legitimate expectation of reemployment. Roth’s contract was for one year, with no provision for renewal.<sup>184</sup> He was not yet eligible for protection under Wisconsin’s tenure statutes.<sup>185</sup> The Court concluded that he lacked any legitimate claim of entitlement to further employment with the University:

[T]he terms of the respondent’s appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.<sup>186</sup>

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179. *Id.* at 570-71 (emphasis in original).

180. *Id.* at 577.

181. *Id.* at 576.

182. *Id.* at 577. As the Court later determined in *Perry*, the expectation of reemployment is a legitimate claim of entitlement, where the expectation is beyond a subjective, unilateral belief.

183. *See id.*

184. The *de facto* tenure issue in *Perry* did not arise due to the finite duration of Roth’s contract. Thus, an adjunct with a finite contract or with temporary status may not be able to prove *de facto* tenure under the *Perry/Roth* doctrine based on the distinction in these cases alone.

185. Roth was fired after his first year of employment with the University. A Wisconsin statute provided that “a state university teacher can acquire tenure as a ‘permanent’ employee only after four years of year-to-year employment. Having acquired tenure, a teacher is entitled to continued employment ‘during efficiency and good behavior.’” *Roth*, 408 U.S. at 566 (quoting WIS. STAT. § 37.31(1) (1967)).

186. *Id.* at 578 (emphasis in original). Roth’s contractual agreement contained no implied promise of continued employment. One year earlier, the Court applied the principle “proscribing summary dismissal from public employment without hearing or inquiry required by due process” to a recently-hired teacher without tenure or formal contract, but with a clearly implied promise for reemployment. *Connell v. Higginbotham*, 403 U.S. 207, 208 (1971).



The application of the *Perry/Roth* doctrine remains questionable with respect to temporary adjunct faculty members.<sup>187</sup> Based on the facts of the two cases alone, a faculty member in a position similar to Sindermann clearly has a greater expectation of continued employment, both in terms of subjective belief and legitimacy. The acquisition of a property interest for an individual adjunct will hinge on the particular situation at the institution. Nevertheless, the potential for acquisition of this property interest does exist under the doctrine. The Constitution will protect the interest if it is acquired.

c. What Process Is Due the Adjunct with an  
Expectancy of Reemployment?

Once the property interest is established, the next question is what process is due before a person can be deprived of that interest.<sup>188</sup> The case of *Arnett v. Kennedy* clouded that question.<sup>189</sup> Kennedy was a nonprobationary federal employee in the competitive civil service in the Chicago Regional Office of the Office of Economic Opportunity ("OEO"). He was dismissed from his position for having allegedly made recklessly false and defamatory statements about other OEO employees. Though he was advised of his right under civil service regulations to reply to the charges, and was informed that the material on which the dismissal was based was available for his inspection, he did not respond to the charges. Instead, he sued in federal court, claiming that the procedures established by and under the Lloyd-La Follette Act for the removal of nonprobationary employees from the federal service deny employees procedural due process.<sup>190</sup> Civil service regulations enlarged the statutory provisions by requiring thirty days advance notice before removal. It entitled the employee to a post-removal evidentiary trial-type hearing at the appeal stage.<sup>191</sup>

Although no consensus in reasoning emerged, a majority of the Supreme Court agreed that Kennedy was not entitled to a full evidentiary hearing before discharge.<sup>192</sup> The Court upheld the discharge and the statute which provided dismissal for cause after notice, a chance to respond, and examination of materials upon which the charge was based, but without a trial-type, pre-removal hearing. Justice Rehnquist noted, "Where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be

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187. One commentator suggested the *Perry/Roth* doctrine may be stated succinctly: "[L]egislatures create property, and courts protect it." Peter N. Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 CAL. L. REV. 146, 146 (1983). Under this view, if the legislature provides no protection for temporary faculty members, it must follow that the courts cannot protect any property interest through procedural due process, absent *de facto* tenure or an implied promise for reemployment.

188. See *Morrissey v. Brewer*, 408 U.S. 471 (1972).

189. 416 U.S. 134 (1974).

190. See *id.* at 134. The Lloyd-La Follette Act, 5 U.S.C. § 7501, required written notice of the charges and a reasonable time for a written notice of the charges and a reasonable time for a written answer and supporting affidavits. See *Arnett*, 416 U.S. at 134.

191. See *Arnett*, 416 U.S. at 145.

192. See *id.* at 157.

employed in determining that right, a litigant . . . must take the bitter with the sweet."<sup>193</sup> The property interest Kennedy acquired in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest.<sup>194</sup>

The Court has not enshrined this "bitter with the sweet" view in the law, for in *Cleveland Board of Education v. Loudermill*, it laid to rest this view that states are free to establish whatever procedures they so choose.<sup>195</sup> The Court held that property interests, once conferred, are subject to constitutional protections. Only nonproperty expectations in employment can be limited by state procedural regulations.<sup>196</sup>

In that case, a private firm supplying guards to the Cleveland Board of Education employed Loudermill. He had applied for a similar position with the Board of Education. Part of the application asked, "Have you ever been convicted of a crime?" Loudermill responded, "No" and signed a declaration that all of his statements were correct to the best of his knowledge.<sup>197</sup> He further acknowledged "that I am aware that any false statements will be sufficient cause for dismissal from or refusal of an appointment for any position with the Cleveland Board of Education."<sup>198</sup>

The Board accepted Loudermill's application. As a classified civil service employee under Ohio law he could be discharged only for "cause."<sup>199</sup> In the event of discharge, the statute required that the discharge order state the reasons for discharge and that a trial board be appointed to hear any appeal within thirty days.<sup>200</sup> The board found a discrepancy on Loudermill's application and dismissed him without a hearing.<sup>201</sup>

Loudermill alleged in his suit that the board failed to allow him a pretermination hearing or an opportunity to respond to the charge of dishonesty.<sup>202</sup> The lack of an opportunity to be heard, Loudermill alleged, deprived him of liberty and property without due process of law. He sought damages and a declaration that the Ohio statute was constitutionally invalid for failing to provide an opportunity for classified civil service employees to respond to charges before removal.<sup>203</sup>

The federal district court considered *Loudermill* in conjunction with a case involving a bus mechanic employed by the Parma, Ohio, Board of Education.<sup>204</sup> Like Loudermill, Richard Donnelly was a classified civil service employee whose

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193. *Id.* at 153-54.

194. *See id.* at 152.

195. 470 U.S. 532, 541 (1985).

196. *See id.*

197. *Loudermill v. Cleveland Bd. of Educ.*, 721 F.2d 550, 552 (6th Cir. 1983), *aff'd*, 470 U.S. 532 (1985).

198. *Id.*

199. *Id.* (citing OHIO REV. CODE ANN. § 124.34 (Anderson 1978)).

200. *See id.* at 552 & n.2.

201. *See id.* at 553.

202. *See id.*

203. *See id.*

204. *See id.* (considering simultaneously the unreported case of *Donnelly v. Parma Board of Education* but not reporting it separately).

employment could be terminated only for cause.<sup>205</sup> The board discharged Donnelly because of his failure to pass an eye examination. The board had previously afforded Donnelly an opportunity to retake the eye examination, but it had not provided him with an opportunity to challenge the discharge.<sup>206</sup>

The Supreme Court abandoned the "bitter with sweet" argument that originated in the plurality opinion in *Arnett v. Kennedy*.<sup>207</sup> The *Loudermill* Court said this "'bitter with sweet' approach misconceives the constitutional guarantee. . . . The right to due process 'is conferred, not by legislative grace, but by constitutional guarantee.'"<sup>208</sup> The Constitution, not a statute, dictates the minimum procedural safeguards necessary to terminate a property interest once conferred:

"While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." In short, once it is determined that the Due Process Clause applies, "the question remains what process is due." The answer to that question is not to be found in the Ohio statute.<sup>209</sup>

The *Loudermill* Court evaluated the three factors identified in *Mathews v. Eldridge* to balance the competing interests at stake.<sup>210</sup> These interests include "the private interests in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination."<sup>211</sup> Recognizing that the private interest involved, the right to a means of livelihood, is of such importance that it cannot be gainsaid, the Court reasoned that "the only meaningful opportunity to invoke the discretion of the decisionmaker" and

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205. See *id.* at 551.

206. See *id.* at 553.

207. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in result in part)).

208. *Id.*

209. *Id.* (alteration in original) (citations omitted).

210. See *id.* at 542-43; *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

211. *Loudermill*, 470 U.S. at 542-43. In deciding *Roth*, the Supreme Court used the decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970), to determine what process was due. See *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972). The Court in *Goldberg* was struck by the unfairness involved when recipients were erroneously deprived of welfare payments and were thus without a means by which to live pending a hearing. *Goldberg*, 397 U.S. at 266. The *Goldberg* Court determined that extensive pre-termination procedures were required. *Id.* Agencies had great disaffection with the *Goldberg* decision because of the consequential difficulty in running the agency due to the time and cost involved in the pre-termination procedures prescribed by *Goldberg*.

The Supreme Court later used the *Mathews* decision to establish a new test. The *Mathews* Court continued to use the *Goldberg* standard of weighing the private interest versus the governmental interest, but also added a three-part test for assessing the due process due to an individual: (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such an interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards, and (3) the government's interest. *Mathews*, 424 U.S. at 333-35.

thereby minimize the possibility of an erroneous decision with debilitating consequences "is likely to be before the termination takes effect."<sup>212</sup>

The Court noted that finding new employment takes time. The task is made more difficult when questionable circumstances surround the termination of the previous job, and the employer has an interest in retaining the qualified employee rather than training a new one.<sup>213</sup> A governmental employer also has an interest in keeping citizens usefully employed rather than forcing its employees onto the welfare rolls.<sup>214</sup> "Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions . . ."<sup>215</sup> Providing the employee an opportunity to respond before termination would impose neither significant administrative burden nor intolerable delay.<sup>216</sup>

Public employees with property interests in continued employment include (1) employees under contract for a specified term of employment for the duration of the contract period; (2) tenured professional employees; and (3) tenured, non-licensed employees who, by statutory definition, can be dismissed only for cause.<sup>217</sup> The *Loudermill* Court concluded that the minimum requirements of due process for tenured public employees are oral or written notice of the charges pending against them, an explanation of the employer's evidence, and an opportunity to present their side of the employment controversy. The opportunity to present reasons, either in person or in writing, why the proposed actions should not be taken, is a fundamental due process requirement.<sup>218</sup>

The property interests determined under the *Perry/Roth* doctrine and discussed in *Loudermill* have routinely been applied to substantive due process claims raised by college faculty. Thus, an untenured faculty member may not benefit from the application of the *Perry/Roth* doctrine under either a procedural or substantive due process claim. Courts have concluded that particular faculty members lacked a property interest in their assignment to a certain department, their teaching of a particular course, or a rank to which they aspired.

Unless non-tenured, temporary faculty members can show that their nonrenewal resulted from a deprivation of a constitutional right, or unless they can demonstrate their property right by statute, contract, or general institutional understanding, they are not entitled to procedural or substantive due process.<sup>219</sup>

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212. *Loudermill*, 470 U.S. at 543.

213. *See id.* at 544.

214. *See id.*

215. *Id.*

216. *See id.*

217. *See id.* at 538-40.

218. *See id.* at 546.

219. One federal district court found a proper analysis of the facts involved in the Fourteenth Amendment property claims of state employees requiring that four questions be answered:

1. Is there a recognizable contractual or other property interest under state law? . . .
2. Is the enforcement of the claimed contractual or other property interest contrary to the expressed public policy of that state? . . .
3. Is the recognized enforceable property interest worthy of the protection of procedural due process under the Fourteenth Amendment? . . .
4. How much protection is required?

In such a case, the faculty member's status is derived solely from state law. The faculty member's case will unlikely succeed in federal court. Because a property right must be supported by statute (or other independent sources),<sup>220</sup> federal courts are reluctant to rule on a matter they consider to be in the domain of the state courts.

#### d. State Statutes Dictate Status

State statutes are often controlling in matters relating to part-time status.<sup>221</sup> However, an institution may find itself in a position similar to that of Odessa Junior College in *Perry* if instructional regulations, understandings, or contractual agreements have led part-timers to expect continuing employment. In fact, even in cases where part-timers may not be entitled to tenure status by law, they may be entitled to procedural due process. This is especially true in instances where a constitutional right has been violated.<sup>222</sup> In this respect, tenure guarantees procedural due process, but absence of tenure does not automatically deprive a faculty member of procedural safeguards.

Generally, faculty status is not covered in the state statutes or administrative regulations. Instead, the status is covered in either collective bargaining contracts or, more often, in individual institutional policies.<sup>223</sup> Because state statutes or regulations do not mention part-time faculty employment, are unclear on the subject, or tend to limit tenure to full-time teachers, there is little consistent litigation concerning part-time status in state courts.<sup>224</sup> Part-timers are often unable to establish constitutional grounds in the federal courts to secure property rights. Moreover, they are statutorily neglected or excluded in state courts. These part-timers must often continue to work with temporary status, subject to momentary dismissal at the whim or fancy of their employers.

Hamm v. Scott, 426 F. Supp. 950, 960 (D. Colo. 1977) (emphasis omitted).

220. See Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

221. See *id.* at 566-67.

222. See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

[T]his Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly."

*Id.* (alteration in original) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). The *Perry* Court noted further that it has applied this principle most often to denials of public employment. It has applied this principle regardless of the public employee's contractual or other claim to a job.

223. See generally Thomas E. Flynn, Comment, *Permanent Temporary Community College Teachers and the Due Process Clause*, 11 PAC. L.J. 993, 996-97 (1980) (discussing California law).

224. See *id.*

One notable exception exists. California is generally recognized as leading all states in the extent of statutory provisions relating to part-time faculty, though this is limited to the community college sector.<sup>225</sup> Yet quantity is not quality. The large number of court cases in that state attests to a certain amount of confusion in interpreting correctly the state's education code. The inability of the courts to settle this issue consistently is captured by the "spaghetti bowl" metaphor, first coined by a Los Angeles Superior Court judge who found the confusing and ambiguous provisions of the code frustrating.<sup>226</sup> His remarks are worth repeating:

"The court asserts with confidence that only one clear principle may be gleaned from this case: The Education Code provisions dealing with temporary teachers must stand as man's masterpiece of obfuscation. . . . Applying the tools of statutory construction so lovingly crafted by the appellate courts over the years leads only to the conclusion that the sections of the Education Code which must be interpreted are a hopeless muddle with direction signs pointing simultaneously and successively north, south, east and west. . . . The Court will do its best to unravel the bowl of spaghetti presented to it then gratefully turn the job over to the Court of Appeal . . . ."<sup>227</sup>

The California Supreme Court considered this issue, though it did not entirely settle it. In *Balen v. Peralta Junior College District*,<sup>228</sup> an instructor continuously rehired for four and a half years at a community college attempted to organize other part-time instructors, purportedly to protect their interests. His actions coincided with a notice of nonrenewal. He alleged his discharge was politically motivated, which violated his First and Fourteenth Amendment rights. He claimed he was denied due process since he qualified as a probationary or permanent employee.<sup>229</sup>

The California Supreme Court held Balen was properly classified as a probationary employee even though he was a part-time instructor. The court found that because Balen was a probationary teacher, he was entitled to pretermination notice and hearing. Because he was denied such notice and hearing, it was "unnecessary to reach his constitutional claims."<sup>230</sup> Balen's continuous service afforded him a legitimate "expectation of employment," such that he had a property interest in his part-time teaching position.<sup>231</sup> Citing the U.S.

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225. See *id.* at 995-96 (listing three-month temporaries, emergency substitutes, year-end substitutes, semester-year substitutes, semester-year temporaries, and part-time temporaries, as categories recognized by the California Education Code). Currently, the California legislature has adopted a health insurance program for part-time faculty. See CAL. EDUC. CODE §§ 87860-87868 (West 1998). Moreover, the legislature included a part-time faculty office hours program, recognizing the need for equal access to professors. See CAL. EDUC. CODE §§ 87880-87885 (WEST 1998).

226. See Ronald B. Head, Legal Issues Relating to Part-Time Faculty Employment 13 (Occasional Paper Series #6: Center for the Study of Higher Education, *University of Virginia-Charlottesville*) (on file with author).

227. *Id.* at 13-14 (quoting California Teacher Ass'n v. Santa Monica Community College Dist., No. C 169 070 (L.A. Super. Ct. unpublished 1970) (omissions in original)).

228. 523 P.2d 629 (Cal. 1974).

229. See *id.* at 631.

230. *Id.*

231. *Id.* at 632.

Supreme Court's ruling in *Perry*, the California Supreme Court noted that "[t]he essence of the statutory classification system is that continuity of service restricts the power to terminate employment which the institution's governing body would normally possess."<sup>232</sup> The court continued by noting Balen's "continuity of service would seem to create the necessary expectation of employment which the [l]egislature has sought to protect from arbitrary dismissal by its classification scheme."<sup>233</sup>

The *Balen* case did not settle the dispute of the classification of part-timers in California.<sup>234</sup> One case which may have settled the issue is *Peralta Federation of Teachers, Local 1603 v. Peralta Community College District*.<sup>235</sup> The Alameda County Superior Court ruled that tenure be granted to three part-timers who had been employed for three consecutive years, and that probationary status be granted to nine other part-timers entering their second consecutive year of employment. The court also ruled, however, that the part-time teachers could be paid lower salaries than those received by full-timers.<sup>236</sup>

On appeal, the appellate court ruled that three of the part-time teachers, those hired while the California Education Code<sup>237</sup> recognized part-timers as probationary employees if they were hired for more than two semesters during a period of three consecutive years, should be afforded regular status and retroactive pro rata pay, while nine other part-timers hired after that date should not have been granted those benefits. The appellate court cited *Balen* as

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232. *Id.* at 631.

233. *Id.* at 632; see also *Deglow v. Board of Trustees*, 138 Cal. Rptr. 177, 179 (Cal. Ct. App. 1977) (citing the *Balen* decision to rebut the District's claim that consecutive part-time contracts did not result in a tenured position).

234. See *Balen*, 523 P.2d at 631.

235. 595 P.2d 113 (Cal. 1979).

236. See *id.* at 117.

237. Three of the teachers had been employed before 1967, at which time a statutory change was enacted authorizing persons teaching not more than 60% of full-time hours to be classified as temporary employees, and the trial court ordered that those teachers be classified as part-time regular employees. See *Peralta Fed'n of Teachers, Local 1603 v. Peralta Community College Dist.*, 138 Cal. Rptr. 144, 147 (Cal. Ct. App. 1977). Section 13337.5 of the California Education Code allowed the district to hire long-term temporary community college teachers providing that

"any person who is employed to teach adult or junior college classes for not more than 60 percent of the hours per week considered a full-time assignment for permanent employees having comparable duties shall be classified as a temporary employee, and shall not become a probationary employee under the provisions of Section 13446."

*Balen*, 523 P.2d at 633 (quoting CAL. EDUC. CODE § 13337.5 (1967) (renumbered and codified in substantially the same form at CAL. EDUC. CODE § 87482(b) (West 1984) (amended 1985))).

"A temporary employee who is not dismissed during the first three school months . . . of the school term for which he was employed and who has not been classified as a permanent employee shall be deemed to have been classified as a probationary employee from the time his services as a temporary employee commenced."

*Id.* at 633 n.7 (quoting CAL. EDUC. CODE § 13446 (1967)).

precedence for granting tenure to three of the teachers.<sup>238</sup> The decision in *Peralta Federation* is important to maintain consistency with *Balen's* rule that part-timers can acquire a property interest through continuing service which creates an expectation of reemployment.

Considerable litigation in California occurs because state statutes authorize some degree of property interest for adjuncts.<sup>239</sup> Most other states do not provide such an interest. Consequently, due to *Roth*, little litigation occurs. Regardless, all part-time instructors teaching a significant number of hours and serving continuously over a number of years may have a legitimate claim to property in their job status. Local conditions, traditional campus practices, statutory provisions, and contractual terms affect the level to which adjunct faculty rights to continued employment arise. Without sound policies, an institution may find that courts will recognize validity to claims of permanent status raised by adjunct faculty members.

### 3. Equal Protection of Adjuncts and Other Faculty

As noted above, adjunct faculty are often similarly situated with full-time faculty in terms of duties, but the compensation bears little comparison.<sup>240</sup> Adjuncts receive little or no fringe benefits. They are often paid an hourly rate, less than a salaried employee would make if he or she were paid by the hour. Because these similarly situated classes are treated so differently in terms of compensation, it would seem that the Equal Protection Clause of the Fourteenth Amendment<sup>241</sup> would protect these adjuncts' expectations. This protection, however, is not successful in court.

Over the years, courts have ruled equal protection under the law affords broad and general relief against all forms of discrimination in classifying individuals, regardless of the rights involved or the persons affected.<sup>242</sup> Although equal protection does not restrict a state from classifying individuals, the state must have a reasonable purpose of classifying the person according to a characteristic.<sup>243</sup> As stated by one federal district court:

[W]hen a government uses a classification to achieve its legitimate objective, the judiciary will examine how closely the means of classification fit with the purpose of the act—under the actual facts—to guarantee that individuals who are similarly situated are similarly treated. As the significance of the particular right increases, the vigor of the court's examination increases.<sup>244</sup>

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238. See *Peralta Fed'n*, 595 P.2d at 118.

239. See CAL. EDUC. CODE § 44909 (West 1998) (entitled "Employment to perform services under contract with public or private agencies or certain categorically funded projects; attainment of permanent status"); *id.* § 44918 (entitled "Substitute or temporary employee deemed probationary employee; reemployment rights").

240. See *supra* Part I.D.

241. U.S. CONST. amend. XIV, § 1.

242. See *Houston Contractors Ass'n v. Metropolitan Transit Auth.*, 993 F. Supp. 545, 559-60 (S.D. Tex. 1997).

243. See *Jinks v. Mays*, 332 F. Supp. 254, 257 (N.D. Ga. 1971).

244. *Houston Contractors Ass'n*, 993 F. Supp. at 550.



The Fourteenth Amendment protects against those classifications which are deemed arbitrary or unreasonable.<sup>245</sup> A part-timer making an equal protection argument must show the classification for purposes of different treatment, such as pay, is unreasonable. An adjunct needs to demonstrate that part-time and full-time teachers share the same characteristics, have equal qualifications and abilities, and perform the same functions, duties, and activities. If the argument is unequal pay, the adjunct must show that he or she is paid proportionately less than a full-timer, and that the lesser pay constitutes an arbitrary and unreasonable employment practice.<sup>246</sup>

A court considering an equal protection argument for equal treatment of adjuncts would utilize the "rational basis" test, employed by the court to determine whether a state's program or policy violates the Equal Protection Clause.<sup>247</sup> Under the rational basis test, an institution's actions are entitled to a presumption of validity.<sup>248</sup> The institution would need merely to show that in some manner adjuncts are not equal to full-timers.<sup>249</sup> A heavy burden of proof is then placed on the person challenging the salary policy of the institution.<sup>250</sup>

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245. See *id.* ("A governmental program favoring one person over another is arbitrary whenever the favoritism is based on a criterion unrelated to the legitimate goal of the program.").

246. Although this argument would be required for a court to determine whether a school has violated the Equal Protection Clause, these same arguments are not successful. See *infra* this Part. Thus, although these statements are illustrative of an adjunct's argument, additional facts will probably be required to sustain an equal protection claim. Perhaps if an institution's salary policy for adjuncts was so unequal with that of full-time or other professors, a court may consider more closely the equal protection argument raised.

247. For the purposes of this discussion, the "strict" or "intermediate" scrutiny tests employed by the courts for classification related to such characteristics as race or sex will not be considered. Courts will not consider a higher degree of scrutiny for adjunct faculty, unless the adjuncts are denied further employment due to a "suspect" or "quasi-suspect" classification. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

248. See *Smith v. Severn*, 129 F.3d 419, 429 (7th Cir. 1997); *Scariano v. Justices of the Supreme Court of Ind.*, 38 F.3d 920, 924 (7th Cir. 1994).

249. The "rational basis" test is not designed to mean any classification with any basis will be upheld (in the absence of a racial or other suspect classification). The Supreme Court has attempted, in different contexts, to defend the use of the "rational basis" test. In a recent case, it noted,

even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority.

*Romer v. Evans*, 517 U.S. 620, 632 (1996) (involving a statute that discriminated against homosexuals which was found in violation of the Equal Protection Clause under the "rational basis" test).

250. Although the Court has defended the "rational basis" test, see *id.*, the rationale for differing pay between adjuncts and full-time professors needs only to be legitimate. The *Romer* Court noted (again, in a much different context), "[i]n the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Id.*

If an adjunct argues that disproportionate pay violates equal protection, it appears from the sparse court decisions that the school may rely upon budgetary restraints as its rational basis for the different pay.<sup>251</sup> One educational researcher<sup>252</sup> indicated that the school district in the *Peralta Federation*<sup>253</sup> case relied on such an argument, but a review of that case and the lower court decision<sup>254</sup> does not indicate that either court took this into consideration. Likewise, the Washington Court of Appeals seemed to accept a similar argument in *McLachlan v. Tacoma Community College District No. 22*,<sup>255</sup> but again it was not in the context of equal protection.<sup>256</sup> In an equal protection case, it seems the school may defend unequal treatment by not only budgetary constraints, but also by differences in the amount and kind of work performed, as well as lower qualifications of the part-time professor.<sup>257</sup> Given the lack of judicial decisions in favor of granting pro rata pay based on equal protection, it appears settled that this argument will fail.

Although equal protection seems to be a weak cause of action for an aggrieved adjunct, in some cases the unequal treatment of different faculty members may lack a rational basis.<sup>258</sup> Two cases in the early 1970s found that different treatment of tenured teachers and non-tenured professors in the context of maternity leave violated equal protection.<sup>259</sup> In *Jinks v. Mays*, a school district forced a non-tenured teacher to resign because she was pregnant.<sup>260</sup> The district did not have the same policy for tenured faculty.<sup>261</sup> The court found that the required resignation bore no relevant purpose to the state's tenure law, nor did it have a relevant purpose to the administrative scheme of the board of education.<sup>262</sup>

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251. See generally LESLIE ET AL., *supra* note 36, at 52-53. The two cases cited here, *Peralta Fed'n of Teachers v. Peralta Community College Dist.*, 595 P.2d 113 (Cal. 1979), and *McLachlan v. Tacoma Community College Dist. No. 22*, 541 P.2d 1010 (Wash. Ct. App. 1975), do not mention equal protection. Moreover, no cases were found in which adjunct professors argued unequal pay violated equal protection, nor were any cases found where adjuncts argued they should receive pro rata pay based on the salary of full-time professors. Apparently, however, adjuncts have attempted to make these arguments. See LESLIE ET AL., *supra* note 36, at 52.

252. See LESLIE ET AL., *supra* note 36, at 52.

253. *Peralta Fed'n of Teachers v. Peralta Community College Dist.*, 595 P.2d 113 (Cal. 1979).

254. See *Peralta Fed'n of Teachers v. Peralta Community College Dist.*, 138 Cal. Rptr. 144 (Cal. Ct. App. 1977).

255. 541 P.2d 1010 (Wash. Ct. App. 1975).

256. See *id.* at 1014.

257. See LESLIE ET AL., *supra* note 36, at 53.

258. These cases, like many others involving adjunct faculty, are fact-specific. A classification based on a particular trait of an adjunct, such as race or sex, may deny the adjunct equal protection, but the unlawful classification will not be based on different treatment of the individual as an *adjunct*, but because the adjunct is treated differently due to the trait.

259. See *Heath v. Westerville Bd. of Educ.*, 345 F. Supp. 501 (S.D. Ohio 1972); *Jinks v. Mays*, 332 F. Supp. 254 (N.D. Ga. 1971).

260. See *Jinks*, 332 F. Supp. at 255.

261. See *id.* at 256.

262. See *id.* at 259.

Likewise, in *Heath v. Westerville Board of Education*, the district required mandatory resignation of any pregnant woman after five months of pregnancy.<sup>263</sup> The reasoning in the latter case was similar to that of the *Jinks* case, but the *Heath* court concentrated on the classification based on sex.<sup>264</sup> In modern jurisprudence, courts would be required to apply a stricter standard to its review of the state action,<sup>265</sup> but these cases at least illustrate how different treatment could violate equal protection.

One 1969 case, *Trister v. University of Mississippi*<sup>266</sup> seems to show how specific the facts must be to lead a court to find unconstitutional treatment. In *Trister*, the University of Mississippi School of Law entered into a contract for a pilot program with the North Mississippi Legal Services Program of the Office of Economic Opportunity, designed to provide legal aid to the poor.<sup>267</sup> The plaintiffs in the case were associate professors who participated in the program as part of their duties.<sup>268</sup> When the law school and the Office of Economic Opportunity ("OEO") terminated their relationship, the school prohibited the associate professors from participating in the legal services program.<sup>269</sup> The associate professors argued that because other professors maintained full or part-time employment as attorneys, the restriction against continued participation in the legal services program violated equal protection.<sup>270</sup> The *Trister* court agreed, but clearly limited its holding:

We are not willing to take the position that plaintiffs have a constitutional right to participate in the Legal Services Program of the OEO, or in any other program. Nor do they have a constitutional right to engage in part-time employment while teaching part-time at the Law School. No such right exists in isolation. Plaintiffs, however, do have the constitutional right to be treated by a state agency in no significantly different manner from others who are members of the same class, i.e., members of the faculty of the University of Mississippi School of Law.<sup>271</sup>

The language in cases such as *Trister* would seem to indicate that adjuncts could make successful arguments that they are not treated equally with other faculty even when they are similarly situated. But as noted above, the argument for equal compensation for equal work has not been successful. In other

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263. See *Heath*, 345 F. Supp. at 504.

264. See *id.* at 504-07.

265. See *Craig v. Boren*, 429 U.S. 190 (1976). *Jinks* and *Heath* were decided as the Supreme Court developed the "intermediate scrutiny" test, applicable to classifications based on sex.

266. 420 F.2d 499 (5th Cir. 1969).

267. See *id.* at 500.

268. See *id.*

269. See *id.* at 501-02.

270. See *id.* at 502-03.

271. *Id.* at 502; see also *Atkinson v. Board of Trustees*, 559 S.W.2d 473 (Ark. 1977). In *Atkinson*, the Arkansas Legislature provided that three of the six types of faculty at state law schools could not practice law. The three restricted classifications of professors were professors, associate professors, and instructors. The law did not apply to distinguished professors, assistant professors, or lecturers. The Supreme Court of Arkansas, citing *Trister*, found this type of unequal treatment violated equal protection. See *Atkinson*, 559 S.W.2d at 475-76.

situations, the specific facts of the individual adjunct would have to lead to a recognized violation of the Equal Protection Clause.<sup>272</sup>

### *B. Contractual Provisions Protecting Adjuncts' Rights*

A contract between a part-time faculty member and an institution may offer some protection for an adjunct or part-time faculty member. The terms of an individual contract will most often give rise to the issue. Contractual terms offer no general protection, for obviously, agreements will vary between different faculty members and the institutions.<sup>273</sup>

#### 1. Terms of Employee Handbook Incorporated Into Contract

A part-timer's claim to tenure may arise from statements in a faculty handbook expressly incorporated or incorporated by reference into the employment contract. In *Zuelsdorf v. University of Alaska, Fairbanks*,<sup>274</sup> for example, an employee manual protected two assistant professors when the university amended its policy of notice in situations where the professor would not be retained.<sup>275</sup> At the time of their appointments, the manual stated that notice was to be given at least fifteen months in advance. The Board of Regents amended the notice policy several times. The board notified both assistant professors six weeks later than the manual's guidelines prescribed. The professors argued they were entitled to contracts for the next academic year because they did not receive notice according to the manual. The Alaska Supreme Court agreed:

University policies and regulations which are expressly incorporated into an employment contract may create vested contract rights in the employee. When one party acquires vested rights under a contract, the other party may not amend the terms of the contract so as to unilaterally deprive the first of its rights; such a change constitutes a modification of the agreement requiring mutual consent and consideration. Once earned, a vested contract right may

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272. The title of this Part, "Limited Legal Remedies," is designed to note the difficulties in designing a legal argument for an aggrieved adjunct faculty member. In terms of the Equal Protection Clause, the arguments may be more realistically deemed "creative," because no standard argument exists.

273. Contractual issues have an overlapping effect with those issues discussed *supra* Part II.A.3. In *Perry*, for example, the language of the employee handbook created, in part, the de facto tenure of the faculty members. A valid, existing contract will also create a property right in itself, protected by the Constitution. See *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972). Collective bargaining itself implies a contractual issue. This Part discusses some separate issues which may give rise to an action by a part-time faculty member due to terms of an individual contract.

274. 794 P.2d 932 (Alaska 1990).

275. See *id.* at 935. The court held that the employee manual was part of a contract between the university and the two professors because the letter of appointment of each professor stated, "[t]he conditions of your employment with the University of Alaska-Fairbanks are described in the Policy and Regulations Manual, Part IV, Personnel, in effect on the date of this letter and as duly amended thereafter." *Id.*

not be modified, diminished or eliminated without employee consent; subsequent unilateral amendments, if effective at all, are effective prospectively only.<sup>276</sup>

Unquestionably, the university could amend its policies. Had it done so before the deadline, the outcome would have been different. A change in employer policy might not affect rights vested or accrued under the prior policy.

Similarly, an Illinois court found that a school incorporated an employee manual into the employment contract when the school "caused its faculty to rely on the manual being part of the 'rules and regulations' to which both parties would be subject."<sup>277</sup> The faculty member was probationary and nontenured for five years. His last contract, signed in March, 1981, appointed him a probationary instructor for the 1981-1982 academic year. His contract with the college included, inter alia, provisions to "adhere to policies enacted by the Board of Trustees, administration, and/or general faculty of McKendree College" and "observe the rules and regulations of the College."<sup>278</sup> When he was not given timely notice of nonrenewal, Arneson, in his breach of contract suit against the college, introduced the faculty manual into evidence as part of the contract referring to "policies" and "rules and regulations." The manual required twelve months notice of nonrenewal after two or more years of service at the institution. The court agreed with Arneson that the school had incorporated the manual into the contract. The court also found the school had breached the contract.<sup>279</sup>

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276. *Id.* (citations omitted); see also *Howard Univ. v. Best*, 484 A.2d 958 (D.C. 1984); *Holiday Inns of Am., Inc. v. Peck*, 520 P.2d 87 (Alaska 1974); *Atchison v. City of Englewood*, 568 P.2d 13 (Colo. 1977); *Logue v. City of Carthage*, 612 S.W.2d 148 (Mo. Ct. App. 1981); *Bolling v. Clevepak Corp.*, 484 N.E.2d 1367 (Ohio Ct. App. 1984); *Tondevoid v. Blaine Sch. Dist. Number 503*, 590 P.2d 1268 (Wash. 1979).

277. *Arneson v. Board of Trustees, McKendree College*, 569 N.E.2d 252, 257 (Ill. App. Ct. 1991). In this case, the school failed to adhere to its handbook regulations. Compare the result with *Taggart v. Drake University*, 549 N.W.2d 796 (Iowa 1996). In *Taggart*, the tenure-track instructor had no breach of contract claim against the university when she was denied tenure for failing to follow handbook procedures for peer review evaluation. *Id.* at 800-04.

278. *Arneson*, 569 N.E.2d at 254.

279. See *id.* at 257. The court addressed the school's contention that because Arneson was employed on a year-to-year contract, the manual was not incorporated and the college had an absolute right not to renew Arneson's contract for the coming year.

The supreme court has held with respect to "at-will" employees that an employee handbook or other policy statement can create enforceable contractual rights limiting the employer's right of immediate dismissal of an employee, if the traditional requirements for contract formation are present:

"First, the language of the policy statement must contain a promise clear enough that an employee would reasonably believe that an offer has been made. Second, the statement must be disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer. Third, the employee must accept the offer by commencing or continuing to work after learning of the policy statement."

*Id.* at 256-57 (quoting *Duldulao v. Saint Mary of Nazareth Hosp. Ctr.*, 505 N.E.2d 314, 318 (Ill. 1987)). Arneson could not be considered an employee "at-will" because he was employed for a definite term. See *id.*

While incorporation of the employee handbook may serve to benefit an aggrieved faculty member, it may likewise bar a remedy. Some employee handbooks may contain a provision where an administrator makes a discretionary decision whether to reappoint a faculty member for another term.<sup>280</sup> If the court finds the employee handbook was indeed incorporated, it may be to the benefit of the school, not the aggrieved faculty member. The faculty member in effect agreed to allow the decision for reappointment to be left to the discretion of the administrator. If the administrator finds in his or her discretion that the reappointment is not warranted, the faculty member has no grounds for a breach of contract claim. Similar results have occurred where the employee handbook prescribed procedures for acquiring tenure, left to the discretion of the administration.<sup>281</sup>

## 2. Other Contract Theories Generally Unsuccessful

Although it would appear equitable solutions may be advanced by an adjunct, such arguments have not been successful.<sup>282</sup> In *Pryles v. State*,<sup>283</sup> the court declined to recognize tenure by estoppel. Pryles served in a dual capacity as Professor and Director of Pediatrics at a New York teaching hospital.<sup>284</sup> Both positions were paid by the hospital, rather than the university.<sup>285</sup> His position as

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280. *See De Simone v. Skidmore College*, 553 N.Y.S.2d 240 (N.Y. App. Div. 1990). The faculty handbook contained a provision where a committee made recommendations to a provost concerning reappointment of a faculty member. *See id.* at 241. The handbook provided the provost would make the decision "to follow or not the recommendations in all cases presented." *Id.* at 242. The faculty member claimed that during his interview he was assured reappointment if he followed handbook standards. The provost did not follow the recommendations and refused to reappoint the faculty member. *See id.* The court held that the faculty member had "received all of the substantive and procedural rights to which he was entitled pursuant to the terms of his contract of employment, which expressly incorporated the handbook, as supplemented by the alleged oral assurances." *Id.* at 243. The handbook contained no express limit on the provost's discretion, giving the provost authority to "make the decision to follow or not the recommendations in all cases." *Id.* at 242.

281. *See Scagnelli v. Whiting*, 554 F. Supp. 77 (M.D.N.C. 1982). The faculty handbook provided a two-year probationary period for associate professors. *See id.* at 79. It contained the clause, "[t]he subsequent appointment shall carry tenure." *Id.* at 80. The faculty member relied on this statement in his claim that he acquired de facto tenure. The court disagreed, noting the handbook also stated, "[t]enure may be granted *only* by the Board of Trustees upon nomination of the President." *Id.* (emphasis in original). The faculty member failed to follow the procedural steps toward tenure clearly stated in the handbook. *See id.* at 79. The court concluded, again referring to the handbook, that "[w]here a university has published written procedures governing tenure, the legitimacy of a claim to tenure acquired *outside* those procedures is vitiated because there is no basis for mutuality." *Id.* (emphasis in original).

282. In fact, cases are scant involving an argument advancing any estoppel, whether it be equitable or promissory. Thus, it appears that not only is the treatment of adjunct faculty generally inequitable, but also that courts acting in equity have not come to the aid of adjunct professors.

283. 380 N.Y.S.2d 429 (N.Y. Ct. Cl. 1975).

284. *See id.* at 431.

285. *See id.*

professor was temporary because the "school would not give permanent appointments to professors whose salaries it did not pay."<sup>286</sup> Seven years later, the hospital discharged him. The university did not object. When the doctor wrote the school president indicating his wish to remain in his teaching position, the president terminated his professorship.<sup>287</sup>

The doctor brought suit for wrongful discharge, claiming that his temporary appointment had matured into a tenured position.<sup>288</sup> He alleged he was given oral assurances by the school president that the temporary appointment was only a technicality because he was not being paid by the school. The court found that the letter of appointment was unambiguous. The appointment was temporary and "by its terms, said appointment was terminable at will by the president of the school."<sup>289</sup> The doctor contended his appointment may have been temporary at first, but matured into a tenured position over time. The court rejected the contention for two reasons: it was contrary to legislative intent, and the "prerequisites for a tenured continuing appointment were not present here and therefor such an appointment could not arise by estoppel or otherwise."<sup>290</sup>

Like the limited remedies afforded by the Fourteenth Amendment and collective bargaining, remedies under contractual claims contain restrictions.<sup>291</sup> It is unlikely a court would find a contract between an adjunct faculty member and an institution a contract of adhesion.<sup>292</sup> Perhaps a lesson adjuncts may learn is that they must accept these positions knowing the restrictions contained in the position. Adjuncts will serve themselves by knowing the rights and restrictions

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286. *Id.* at 431.

287. *See id.*

288. *See id.* at 434.

289. *Id.*

290. *Id.* at 435. The court also found that because the hospital paid Dr. Pryles's salary and had "jurisdictional power to determine the acceptability and desirability of members of the hospital's medical staff irrespective of faculty appointment," the state had no liability. *Id.* at 438 (quoting the appointment letter of 9/1/65). Any benefits from Pryles's services were as a third-party beneficiary of his contract with the hospital. *See id.* The court also noted that Pryles's support for his claim of tenure by estoppel came from cases in which, unlike Pryles's case, the school paid the teacher. *See id.* at 435.

291. In one case, the parol evidence rule barred evidence that the school promised a faculty member a tenure-track position. *See Lawrence v. Providence College*, No. 94-1051, 1994 WL 390130 (1st Cir. July 13, 1994) (unpublished disposition). In *Lawrence*, the school allegedly orally promised the adjunct position and contemporaneously signed a one-year contract each of three years the faculty member was in the position. *See id.* at \*1. The court found the parol evidence rule barred these alleged oral agreements. The terms of the oral agreement contradicted the terms of the complete and fully integrated written agreement. The court also found subsequent oral agreements to the position lacked consideration. *See id.* at \*3.

292. Even if the contract between the institution and the faculty member was a standard-form contract, it would still be unlikely that a typical contract between an adjunct and an institution would be one of adhesion. An adjunct, for example, may indicate the strong bargaining power the institution has over such a faculty member. But even the agreements which create the adjunct's dilemma, as discussed in this Article, generally do not create terms which contradict recognized public policy. *See Weaver v. American Oil Co.*, 276 N.E.2d 144 (Ind. 1971) (discussing unconscionable contractual terms and a contract of adhesion containing terms violative of public policy). Most adjuncts enter these agreements voluntarily.

contained in any agreement with the school. In some situations, such rights and restrictions will give rise to a claim if the school has breached the agreement. In others, adjuncts may remain aggrieved, despite the injustice they feel has occurred as a result of the situation.

### *C. Protection Through Collective Bargaining*

A more recent movement to protect rights of adjuncts has been to organize adjuncts and fight for equitable treatment through collective bargaining.<sup>293</sup> Adjuncts at different institutions around the country have begun to unite to voice their concerns.<sup>294</sup> Recent protests by part-time faculty have occurred at City University in New York<sup>295</sup> and in the State of Washington.<sup>296</sup> Early in 1997, nearly 2000 part-timers in New Jersey's state colleges voted to unionize.<sup>297</sup> Later that year, more than 1000 adjuncts at the University of Alaska voted to create their own single collective bargaining unit.<sup>298</sup> Part-timers at Columbia College in Chicago won a "victory" of sorts in February 1998, voting to form their own bargaining unit against the protests of college administrators.<sup>299</sup> Just as

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293. To some degree, largely depending on the position of an adjunct, collective bargaining may be a stronger avenue for protection than reliance on constitutional protection. Somewhat like constitutional protection, the likeliness of successful protection through collective bargaining will depend on a number of factors, including whether a particular school is public or private, the extent of the use of adjunct and part-time faculty at a particular institution, and any economic position the adjuncts as a collective have at a particular school. These and additional factors will be considered in this part.

294. See Courtney Leatherman, *Faculty Unions Move to Organize the Growing Ranks of Part-Time Professors*, CHRON. HIGHER EDUC., Feb. 27, 1998, at A12.

295. See *id.* "A group called CUNY (City University of New York) Adjuncts Unite in February 1998 bypassed the Professional Staff Congress, an affiliate of the American Federation of Teachers that represents all faculty members at [CUNY] . . . and staged a protest at CUNY's central offices." *Id.*

296. See *id.* After two legislative proposals attempting to provide better pay for adjuncts died in committee, part-time and full-time professors in the State of Washington's community and technical colleges rallied at the capital. The sponsor of the rally, the Washington Federation of Teachers, "parked a car on the capital steps with a sign that read 'Typical Part-Time Faculty Office.'" *Id.*

297. See *id.*

298. See *id.*; see also Julianne Basinger, *Alaska Judge Clears Way for Adjuncts to Bargain*, CHRON. HIGHER EDUC., Jan. 23, 1998, at A14. An Anchorage Superior Court cleared the way for adjuncts to create a single collective bargaining unit, affirming a favorable decision by the Alaska Labor Relations Agency. See Basinger, *supra*, at A14. The adjuncts had not received a pay raise since 1980. Adjuncts voted in favor of the single bargaining unit 425-195. See *id.*

299. See Leatherman, *supra* note 294, at A12. Columbia offers degrees in the fine and performing arts, as well as communications. Its part-time faculty included a number of professional artists, dancers, and journalists. See *id.* Administrators argued its campus did not hire adjuncts for purely economic reasons, noting some part-timers had been promoted to full-time, while other part-timers held supervisory posts. Nevertheless, adjuncts argued for more money, benefits, and a bigger voice in the process. See *id.* The effort to unionize was "the only way [the adjuncts] were going to get anywhere," according to the union spokesperson. *Id.* (alteration in original) (quoting John Stevenson, a part-time instructor and union spokesman). The adjuncts voted for unionization with a 299-80 vote. See *id.*



institutions have found hiring adjuncts provides economic incentive,<sup>300</sup> the widespread hiring has likewise created a collective group of employees "ripe for organizing."<sup>301</sup> As the proportion of part-timers utilized by institutions continues to rise—it has nearly doubled in the last twenty years<sup>302</sup>—the number of adjuncts unionizing has also seen a substantial increase. In 1982, part-timers at only three institutions had managed to form their own separate bargaining units<sup>303</sup> and persisted to the point of negotiating a contract.<sup>304</sup> By 1996, part-time faculty at about eighty institutions had formed separate bargaining units, representing about 18,000 part-timers.<sup>305</sup> About 37% of these have been formed since 1990.<sup>306</sup> Part-time faculty are represented in the same bargaining units as full-time faculty at about 225 institutions.<sup>307</sup>

The potential success of the collective bargaining movement by adjuncts cannot be examined unilaterally. In some situations, inclusion in a bargaining unit with full-time faculty may be appropriate and more effective. Other part-timers may find more bargaining strength will exist by forming their own bargaining units. Others may not be included with full-timers because the bargaining unit would not be appropriate.<sup>308</sup> National and state labor boards will dictate the appropriateness of the bargaining unit to some degree,<sup>309</sup> but the adjuncts'

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300. Economic gain is not the only incentive to hire adjuncts, but schools hiring adjuncts nevertheless receive economic gain.

301. Leatherman, *supra* note 294, at A12.

302. *See id.*

303. "Unit determination" is a labor-relations term referring to the process for determining whether a group of employees should be included or excluded from a legally constituted collective bargaining unit. The most common principle involved to determine inclusion or exclusion is "community of interest," which relates to a similarity or mutuality of interest among employees within a group or between two or more persons, such that they can all be incorporated within a single bargaining unit. *See generally* Francis M. Dougherty, Annotation, "Community of Interest" Test in NLRB Determination of Appropriateness of Employee Bargaining Unit, 90 A.L.R. Fed. 16 (1988 & Supp. 1997).

304. *See* LESLIE ET AL., *supra* note 36, at 59. The institutions included three in the New York metropolitan area: Rutgers University, C.W. Post College of Long Island University, and Nassau Community College.

305. *See* Leatherman, *supra* note 294, at A12. These statistics were compiled by the National Center for the Study of Collective Bargaining in Higher Education and the Professions, at CUNY's Baruch College. *See id.*

306. *See id.*

307. *See id.*

308. This grouping with full-time faculty may not be a decision made by the adjuncts, but by the labor boards determining appropriate unit determination.

309. The National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169 (1994), is the basic labor law in the United States. *See* Douglas S. Streitz & Jennifer A. Hunkler, Note, *Teaching or Learning: Are Teaching Assistants Students or Employees?*, 24 J.C. & U.L. 349 (1997) (discussing collective bargaining units with respect to student assistants). However, its terms expressly exclude employees of state and local governments, including faculty members at public institutions. *See* 29 U.S.C. § 152(2), amended by 29 U.S.C. §§ 141-144, 167, 171-187 (1994); Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-402, 411-415, 431 (1994); *see also* Richard Kirschner, *Labor-Management Relations in the Public Sector: An Introductory Overview of Organizing Activities, Bargaining Units, Scope of Bargaining, and Dispute Resolution Techniques*, in BASIC EMPLOYMENT AND LABOR LAW-IN

position within an institution itself will also have a bearing on the success of bargaining efforts.

# 1. Including Part-Timers and Full-Timers in a Joint Bargaining Unit

## a. The NLRB's Exclusion of Adjuncts from Bargaining Units with Full-Timers

Congress enacted the National Labor Relations Act ("NLRA" or "Act")<sup>310</sup> to allow employees to bind together as bargaining units to better their position through collective bargaining. Under the Act, "[e]mployees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."<sup>311</sup> The NLRA prohibits the National Labor Relations Board ("NLRB" or "Board") from deciding whether an employee unit is appropriate if the unit contains both professional and non-professional employees, without a majority of the professionals voting to include the mixed unit.<sup>312</sup> The NLRB settled this issue in favor of adjuncts in 1971, deciding adjuncts were indeed "professionals" under the definition in 29 U.S.C. § 152(12).<sup>313</sup> Subsequent

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DEPTH (ALI-ABA Course of Study 1997). These faculty members rights through collective bargaining are determined by state statute, state constitution, and the federal constitution.

310. 29 U.S.C. §§ 151-169 (1994).

311. *Id.* § 157.

312. *See id.* § 152(12).

The term "professional employee" means (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

*Id.* The question of who is or who is not a professional employee has been litigated in more than 300 NLRB cases in more than 100 different occupational classifications. *See Gillespie, supra* note 94, at 35.

313. *See C.W. Post Center*, 189 N.L.R.B. 904 (1971).

decisions by the NLRB affirmed that distinction.<sup>314</sup> It was during the same time period, however, that the NLRB refused to find adjuncts should be included with full-time faculty as an appropriate bargaining unit.<sup>315</sup>

Section 159 of the NLRA gives the Board the power to determine whether a unit of employees is appropriate, "in order to assure employees the fullest freedom in exercising the rights guaranteed by . . . [the NLRA]."<sup>316</sup> The guidance given to the Board is scant.<sup>317</sup> The NLRB explained in 1962:

In determining the appropriate unit, the Board delineates the grouping of employees within which freedom of choice may be given collective expression. At the same time it creates the context within which the process of collective [sic] bargaining must function. Because the scope of the unit is basic to and permeates the whole of the collective-bargaining relationship, each unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered.<sup>318</sup>

The NLRB developed as its central principle and fundamental consideration in determining the appropriateness of bargaining units the community-of-interest doctrine.<sup>319</sup> Courts and the Board have considered a number of factors when determining whether particular employees share a community of interest, including:

(1) similarity in skills, training, or expertise; (2) similarity in job functions or job classifications; (3) similarity in wages, wage scale, or method of determining compensation; (4) similarity in fringe benefits; (5) similarity in work hours; (6) similarity in work clothes or uniforms; (7) similarity of job situs or geographical proximity of employees; (8) interchangeability of employees or job assignments; (9) common supervision; (10) centralization of employer's personnel and labor policies; (11) integration of employer's production processes or operation; (12) similarity of relationship to employer's administrative or organizational structures; (13) common history of bargaining with employer; (14) reflection of industry bargaining pattern; (15) expressed desires of employees; and (16) employee's organizational framework or extent of union organization.<sup>320</sup>

314. See *College of Pharmaceutical Sciences*, 197 N.L.R.B. 959 (1972); *Manhattan College*, 195 N.L.R.B. 65 (1972); *University of New Haven, Inc.*, 190 N.L.R.B. 478 (1971); *Long Island Univ. (Brooklyn Ctr.)*, 189 N.L.R.B. 909 (1971).

315. *New York University*, a leading NLRB case finding adjuncts should not be included as an appropriate bargaining unit with full-timers, was decided in 1973. *New York Univ.*, 205 N.L.R.B. 4 (1973). This case and the cases leading to it are discussed *infra*, pp. 564-67.

316. 29 U.S.C. § 159(b).

317. See Dougherty, *supra* note 303, at 33.

318. *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134, 137 (1962) (citation omitted).

319. See Dougherty, *supra* note 303, at 34; see also *Uyeda v. Brooks*, 365 F.2d 326, 329 (6th Cir. 1966) (describing the community-of-interest doctrine as the touchstone of appropriate unit determinations).

320. Dougherty, *supra* note 303, at 34-35; see also, e.g., *Haag Drug Co.*, 169 N.L.R.B. 877 (1968) (discussing the presumption that single stores of a retail chain are appropriate units for bargaining); *Agawam Food Mart, Inc.*, 162 N.L.R.B. 1420 (1967) (examining whether meat

"In deciding the first cases involving unit determination of part-time faculty, the [NLRB] and most state labor boards relied on . . . [policy] decisions relating to part-time employment in industry."<sup>321</sup> The Sixth Circuit summarized the position of the Board regarding part-time unit determination in the industrial sector:

The Board has established a policy of including regular part-time production employees in a bargaining unit with full-time production employees. . . . The tests used by the Board are whether the part-time employees work at regularly assigned hours [of] a substantial number each week, perform duties similar to those of full-time employees, and share the same supervision, working conditions, wages, and fringe benefits. . . . Where these factors exist, the Board has held that part-time employees have a community of interest with the full-time employees and sufficient interest to entitle them to be included in the unit.<sup>322</sup>

Relying on this policy, the NLRB included adjuncts within the full-time bargaining units.<sup>323</sup> In two cases at Long Island University, *C.W. Post Center*<sup>324</sup> and *Brooklyn Center*,<sup>325</sup> the Board discussed "well-settled" principles in the industrial sphere, stating it could find no "clear-cut pattern or practice of collective bargaining in the academic field" to cause it to modify such principles.<sup>326</sup> The Board admitted there were differences between the full-time and adjunct teachers at Long Island University, but such differences were deemed to be minimal.<sup>327</sup>

One question not resolved in these early cases was what constitutes "regular part-time" status for faculty members.<sup>328</sup> In *University of Detroit*,<sup>329</sup> the Board attempted to provide a solution.<sup>330</sup> Inclusion within a full-time unit was extended to law school faculty. The NLRB derived a formula to determine the eligibility of law school professors whose load was not consistent with the full-time faculty of the university. In effect, all part-timers carrying one-quarter or more of a full-time load were defined as "regular part-time" faculty members.<sup>331</sup> The NLRB applied the same formula in subsequent decisions.<sup>332</sup>

department employees at all store locations must be included in one unit); *Continental Baking Co.*, 99 N.L.R.B. 777 (1952) (holding multi-plant unit inappropriate where plants were spread across country and there was a history of local bargaining).

321. Ronald B. Head & David W. Leslie, *Bargaining Unit Status of Part-Time Faculty*, 8 J.L. & EDUC. 359, 361-62.

322. *Id.* at 362 (quoting *Indianapolis Glove Co. v. NLRB*, 400 F.2d 363, 367 (6th Cir. 1968)).

323. See *Indianapolis Glove Co.*, 400 F.2d at 363.

324. 189 N.L.R.B. 904 (1971).

325. *Long Island Univ. (Brooklyn Ctr.)*, 189 N.L.R.B. 909 (1971).

326. *C.W. Post*, 189 N.L.R.B. at 905 n.7.

327. See *id.*; ROBERT K. CARR & DANIEL K. VAN EYCK, *COLLECTIVE BARGAINING COMES TO THE CAMPUS* 86 (1973).

328. See CARR & VAN EYCK, *supra* note 327, at 86.

329. 193 N.L.R.B. 566 (1971).

330. See CARR & VAN EYCK, *supra* note 327, at 88.

331. See *University of Detroit*, 193 N.L.R.B. at 567.

332. See *Catholic Univ.*, 201 N.L.R.B. 929, 930 (1973); *Tusculum College*, 199 N.L.R.B. 28, 32 (1972); *Manhattan College*, 195 N.L.R.B. 65, 66 (1972).

In one leading case, *University of New Haven, Inc.*,<sup>333</sup> the Board required inclusion of part-time faculty in the same bargaining unit with full-time faculty. However, the NLRB reversed its position in 1973 in *New York University*, where the Board first explained, "[t]his issue has been raised before and . . . has consistently been resolved in favor of inclusion [of part-timers with full-timers]. . . . [W]e have reached the conclusion that part-time faculty do not share a community of interest with full-time faculty, and, therefore, should not be included in the same bargaining unit."<sup>334</sup> The differences between full-time and part-time faculty were so substantial the Board refused to adhere to principles found in the *New Haven* case.<sup>335</sup> The prime determinate for an appropriate bargaining unit is "mutuality of interest in wages, hours, and working conditions."<sup>336</sup> Part-timers and full-timers at N.Y.U. lacked such mutuality of interest in four major areas: compensation,<sup>337</sup> participation in university governance,<sup>338</sup> eligibility for tenure,<sup>339</sup> and working conditions.<sup>340</sup> Because of such

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333. 190 N.L.R.B. 478, 478 (1971).

334. *New York Univ.*, 205 N.L.R.B. 4, 6 (1973).

335. *See id.* at 6.

336. *Id.* at 6-7 (quoting *Continental Baking Co.*, 99 N.L.R.B. 777, 782 (1952)).

337. *See id.* at 6.

There is a marked difference in the compensation paid the part-time faculty and the full-time faculty. The record reveals that a substantial percentage of the part-time faculty receives a modest sum which corresponds to a respectable honorarium. Generally an adjunct's primary work interest is elsewhere and his primary income is received from sources other than the University. Fringe benefits (including medical, hospital, and life insurance as well as retirement pension) are available to all full-time faculty. They are not available to part-time faculty members.

*Id.* (footnote omitted) (parenthetical in original).

338. *See id.*

The part-time faculty members do not participate in the governance of the University. They are excluded from membership on both the university senate and the faculty council. They do not participate in departmental decisions with respect to appointment, promotion, or tenure status. Similarly, they are not consulted with respect to curriculum development, degree requirements, selection of department chairmen, or admission requirements. In no real sense do the part-time faculty share the responsibilities of the full-time faculty in the development of the institutional policies of the University.

*Id.*

339. *See id.* at 7.

Only the full-time faculty members of the University are eligible for tenure status. Part-time faculty members are hired on a single semester basis with no real obligation of renewal of appointment. The relationship of the part-time faculty member to the University remains transient even though he may be employed for a number of years. No matter how long he remains a part-time faculty member with the University, the critical fact is he can never gain tenure, which is available only to members of the full-time faculty.

*Id.*

340. *See id.*

In no real sense can it be said that the working conditions of the full-time faculty and the part-time faculty are the same. A part-time faculty member's

differences, the Board concluded that part-timers and full-timers should not be included together: "We should not endanger the potential contribution which collective bargaining may provide in coping with the serious problems confronting our colleges and universities by improper unit determinations. In our judgment, the grouping of the part-time and full-time faculty into a single bargaining structure will impede effective collective bargaining."<sup>341</sup>

Given the substantial number of NLRB and court cases adhering to the rule announced in *New York University*,<sup>342</sup> the issue seems almost too well-settled to discuss further. Exclusion, however, is not automatic.<sup>343</sup> Peter Walther, a member of the Board, explained,

The lesson to be learned . . . is that *NYU* will not necessarily be applied automatically to exclude part-time faculty members from faculty bargaining units. The greater the role given part-timers in the daily functioning of the institution, and the greater their participation in the university-provided fringe benefits, the more likely it is that they will be found to share a community of interest with their full-time colleagues sufficient to justify their inclusion in a single bargaining unit.<sup>344</sup>

The Board's decision did, however, seem to create a substantial gap between inclusion in the public and private sectors. In 1982, about 28% of private-sector bargaining units included part-time faculty, although not all part-timers at a given institution were necessarily included in this unit.<sup>345</sup> Comparatively, 41% of public-sector bargaining units, unaffected by the NLRA, included part-timers.<sup>346</sup>

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obligation to the University is limited to teaching 2 or 3 credit hours per semester. He has no responsibilities beyond teaching and grading. The full-time faculty member is expected, however, in addition to teaching and grading, to engage in research, writing, or some other creative endeavor, to counsel students, and to participate in the affairs of his department and the University. A full-time faculty member is engaged in a wide variety of activities which demand, on the average, between 50 and 60 hours per week. Part-time faculty members have no comparable workload.

*Id.*

341. *Id.* at 7-8.

342. The bulk of these cases arose in the 1970s. See *Trustees of Boston Univ. v. NLRB*, 575 F.2d 301 (1st Cir. 1978); *Kendall College v. NLRB*, 570 F.2d 216 (7th Cir. 1978); *NLRB v. Yeshiva Univ.*, 582 F.2d 686 (2d Cir. 1978); *Point Park College*, 209 N.L.R.B. 1064 (1974); *Catholic Univ. of Am.*, 205 N.L.R.B. 130 (1973); *Farleigh Dickinson Univ.*, 205 N.L.R.B. 673 (1973).

343. See *Head & Leslie*, *supra* note 321, at 367 (citing *Kendall College*, 13-RC-13911 (unpublished decision 1976); *Cottey Junior College*, 17-RC-7979 (unpublished decision 1976); Peter D. Walther, *The N.L.R.B. in Higher Education* (paper presented to the ACBIS-CUPA Collective Bargaining Conference, Washington, D.C. (Dec. 11, 1977))).

344. Walther, *supra* note 343, at 7.

345. See *LESLIE ET AL.*, *supra* note 36, at 59.

346. See *id.*

b. Partial Inclusion of Part-Time Faculty by State Labor  
Boards

While the NLRB establishes guidelines for private institutions, state labor boards control the collective bargaining activities at public institutions. With respect to the part-time question, there has been considerable inconsistency from one jurisdiction to another. The uncertainty with which the board has dealt with the issue has led to different results due to the many unique conditions at individual campuses.<sup>347</sup> Though rulings are inconsistent among various states, state labor boards are more likely to include part-timers than the NLRB.<sup>348</sup> In at least nine states, part-timers have been included.<sup>349</sup> Two cases are highly significant. One, involving the University of Massachusetts, contained a lengthy and persuasive argument advanced for including part-timers in four-year institutions.<sup>350</sup> The other, involving a community college, could improve part-time faculty employment rights in a state (California) noted for its liberal attitudes toward part-timers.<sup>351</sup>

At the University of Massachusetts, the Massachusetts Labor Relations Commission ("MLRC") deliberated for two years to determine unit composition. In 1976, it ruled that part-timers who had taught at least one course for three consecutive semesters were eligible for inclusion within the full-time unit.<sup>352</sup> Part-timers, it was found, share community of interest with full-timers at all branch campuses of the University.<sup>353</sup> The Commission recognized that its ruling was contrary to the NLRB decision in *New York University*, but proceeded to show that community of interest did exist with respect to three of the four guidelines established by the NLRB.<sup>354</sup> Part-timers and full-timers performed the same qualitative duties but part-timers were paid a fractional proportion of the full-time salary. Part-timers were not authorized to sit on the university assembly or faculty senate, but did participate in governance at the departmental and college levels. Furthermore, accountability procedures for both groups were substantially the same. Eligibility for tenure was the only major difference between full-time and

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347. See Head & Leslie, *supra* note 321, at 367.

348. See *id.* at 370.

349. These states include California, Indiana, Massachusetts, Michigan, Montana, Oregon, Pennsylvania, Vermont, and Wisconsin. See LESLIE ET AL., *supra* note 36, at 52.

350. See Decision, Order, and Direction of Election, Board of Trustees, Univ. of Mass., Case No. SCR-334 (Mass. Labor Relations Comm'n, Oct. 15, 1976).

351. See Decision, Los Rios Community College Dist., Case No. S-R-438 (Cal. Educ. Employment Bd., June 9, 1977).

352. See Decision, Order, and Direction of Election, Board of Trustees, Univ. of Mass., Case Nos. SCR-2079, SCR-2082 (Mass. Labor Relations Comm'n, Oct. 15, 1976).

353. See *id.* at 26-28.

354. See *id.* at 30-31 (distinguishing *New York Univ.*, 205 N.L.R.B. 4 (1973)).

part-time faculty members. The Commission noted that tenure was not a true indication of community of interest.<sup>355</sup>

The most difficult problem facing the MLRC was not whether to include or exclude part-timers, but that of "drawing the line for exclusions of that portion of the part-time faculty who do not share a community of interest with the remainder of the faculty."<sup>356</sup> Indeed, the Commission claimed that "a complete description of the terms and conditions of all part-time faculty members employed by the University would require a treatise."<sup>357</sup> As noted, the problem was resolved by excluding part-timers who had not taught at least one course for three consecutive semesters. This decision was based upon "the reasonable expectation that persons who have taught with the above-described regularity maintain a sufficient and continuing interest in their working conditions to warrant their inclusion within the unit."<sup>358</sup>

The premise that regularity in teaching at a particular institution establishes sufficient interest in a part-timer's condition to be included within the unit is important in a state employing a large number of part-timers. California is one such state.<sup>359</sup> The issue was so charged in the mid-1970s that a hearing officer released a decision concerning part-time unit determination within the San Joaquin Delta Community College District without waiting for the California Educational Employment Relations Board ("EERB") to set precedent for the case.<sup>360</sup> Part-timers serving more than two semesters within a three-year period were included in the full-time unit.<sup>361</sup> The hearing officer supported his decision by recognizing the distinct differences between community college and university teachers. He deemed the NLRB's decision in *New York University* inapplicable at the community college level.<sup>362</sup>

In June 1977, the EERB issued guidance on this controversial issue with the release of its decision concerning the *Los Rios Community College District*.<sup>363</sup> The Board ruled that all part-timers who taught classes for an equivalent of three of the preceding six semesters should be included in the faculty bargaining unit. The EERB stated that part-time and full-time faculty shared nearly identical job qualifications and functions, were hired in the same manner, participated in the same manner and in the same faculty organizations, were afforded similar

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355. See *id.* at 28-29 (quoting Member Fanning's dissent in *New York University*, stating tenure was defined as "no more than a measure of continuity of interest, and an extreme one at that").

356. *Id.* at 20-21.

357. *Id.* at 20.

358. *Id.* at 29.

359. See Head & Leslie, *supra* note 321, at 373.

360. See Proposed Decision, San Joaquin Delta Community College Dist., Case No. S-R-459 (Cal. Educ. Employment Relations Bd., May 12, 1977).

361. See *id.*

362. See *id.* (distinguishing *New York Univ.*, 205 N.L.R.B. 4 (1973)).

363. Decision No. 18, Los Rios Community College Dist., Case No. S-R-438 (Cal. Educ. Employment Relations Bd., June 9, 1977).



benefits, and were committed to the same institutional environment.<sup>364</sup> Noting that its decision was contrary to *New York University*, the EERB commented:

We do not find this approach applicable to the context of California's community college system. The NLRB cases deal with four-year universities which place an emphasis on research and writing not found in the community college system. . . . We find significant distinctions between the facts in this case and those in *New York University*. Unlike *New York University*, the compensation of part-time faculty here is directly related to that of full-time faculty. . . . In addition, part-time faculty participate in the faculty governance functions of the colleges in the same manner as full-time instructors by serving in the faculty senates and on various advisory committees. . . . Finally, while differences do exist in the working conditions of full- and part-time instructors, their job duties and responsibilities are virtually identical.<sup>365</sup>

The fourth guideline—eligibility for tenure—was not considered a significant factor because the question of part-time faculty classification had not yet been completely resolved by the California courts. Of considerable importance in both of these decisions, *University of Massachusetts* and *Los Rios*, is the fact that continuity of service, not level of service, was the basis for determining eligibility for unit inclusion of part-time instructors. It appears to be the case in court decisions concerning part-time classification that length of service may be a more important factor than degree of workload when considering part-time faculty employment rights. As the EERB commented in *Los Rios*:

While most jurisdictions have approached this ticklish problem by looking at the percentage of full-time hours taught by part-time faculty, it has not been a particularly satisfying solution. Rather, we think that persons who continually, semester after semester, teach in the community colleges have demonstrated their commitment to and interest in its objectives. It seems unlikely that persons who have only a minimal interest in the community college will continually seek or obtain employment there.<sup>366</sup>

Few recent cases involve disputes over inclusion of part-timers with full-timers in bargaining units at the state level. In a 1996 case, an Illinois Appellate Court held the inclusion of regular part-time faculty was appropriate with a bargaining unit also consisting of full-time faculty.<sup>367</sup> Inclusion of part-timers and full-timers

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364. *See id.* at 3-12.

365. *Id.* at 9-11.

366. *Id.* at 12 (citation omitted).

367. *See* Community College Dist. No. 509 v. Illinois Educ. Labor Relations Bd., 660 N.E.2d 265 (Ill. App. Ct. 1996). The Supreme Court of Vermont in 1989 found the opposite in its determination of the state's labor relations act. *See* Vermont State Colleges Faculty Fed'n v. Vermont State Colleges, 566 A.2d 955 (Vt. 1989). In that case, the court found that teaching adjuncts employed on a part-time basis, but who had a reasonable expectation of reemployment at state colleges, qualified as "state employees" entitled to protections of the State Employees Labor Relations Act, but that adjuncts did not share a sufficient community of interest with full-time faculty members to be included in the same bargaining unit. *See id.* at 958-59. Much like the NLRB decision in *New York University*, the court found that because adjuncts were ineligible for tenure, paid on a per-credit basis, and not required to act as formal student advisors or maintain reasonable office hours, the adjuncts did not share a community of interest with full-time faculty members. *See id.*

is perhaps not unusual, but it may be difficult to comply with standards developed by both the NLRB and state labor boards.<sup>368</sup> For this reason, it may not only be appropriate for part-timers to form their own bargaining unit, but it may also be necessary.

## 2. Part-Timers Forming a Separate Bargaining Unit

While the NLRB had several occasions to exclude adjuncts from bargaining units with full-timers throughout the decade of the 1970s, it did not have occasion to include part-timers as their own separate bargaining unit.<sup>369</sup> Two years after the *New York University* decision, part-timers at Goddard College in Vermont<sup>370</sup> sought to be included with full-timers in one bargaining unit.<sup>371</sup> Alternatively, they asked the Board to find that part-timers could form a separate bargaining unit, should the Board find the joint bargaining unit inappropriate.<sup>372</sup> The NLRB did find the joint bargaining unit inappropriate, but did not include the part-timers in a separate bargaining unit.<sup>373</sup> The decision did not preclude part-timers in general from forming their own bargaining unit, but found that the particular part-timers at Goddard shared little in common beyond their part-time status.<sup>374</sup>

The Board set the precedent for allowing part-timers to form their own bargaining unit in a 1982 case, *University of San Francisco*.<sup>375</sup> The University of San Francisco employed approximately 250 part-time lecturers and 120 adjunct faculty<sup>376</sup> in more than 100 locations around the State of California.<sup>377</sup> All part-

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368. As discussed earlier, bargaining units at about 225 institutions include part-timers to some degree with full-timers. See Leatherman, *supra* note 294, at A12.

369. See *University of San Francisco*, 265 N.L.R.B. 1221, 1222 (1982).

370. Goddard College itself is located in Vermont, but had a nationwide masters program. See *Goddard College*, 216 N.L.R.B. 457, 457 (1975).

371. See *id.*

372. See *id.*

373. See *id.* at 459. The Board did include professional librarians and counselors with the full-time faculty in the unit. However, the remainder of part-time faculty were employed in a variety of different areas. The masters program itself employed "core" faculty members in such locations as Plainfield, Vt.; Los Angeles; Boston; Philadelphia; New York City; Washington, D.C.; and San Francisco. These faculty were excluded, along with other part-timers in other programs, library assistants, teaching fellows, graduate interns, field faculty in the graduate program, and co-directors of a learning aid center, as well as other administrative personnel. See *id.*

374. Goddard College was not considered precedent for excluding part-timers from forming their own bargaining unit. See *University of San Francisco*, 265 N.L.R.B. at 1223. The particular part-timers at Goddard had different wages, hours, responsibilities, locations, and conditions of employment. See *Goddard College*, 216 N.L.R.B. 457, 457 (1975).

375. 265 N.L.R.B. 1221 (1982).

376. The colleges of liberal arts and sciences employed approximately 83 part-time lecturers. In addition, more part-time lecturers were employed in special programs throughout the state. See *id.* at 1222.

377. See *id.*

time instructional faculty of the University<sup>378</sup> sought to be included in one bargaining unit, against the arguments brought by the University.<sup>379</sup> The University contended that no part-time faculty could be appropriate because all such employees were "hired on an as-needed basis when there [was] a requirement of special expertise or in emergencies when a full-time faculty member [became] ill or suddenly [took] a leave of absence."<sup>380</sup> Moreover, the University contended that part-time faculty could not have a reasonable expectation of future employment, so the position was essentially temporary in nature and no appropriate unit could be found.<sup>381</sup>

The Board found neither of the University's arguments persuasive. It found that hiring of employees on the basis of special expertise is not indicative of temporary status:<sup>382</sup>

Presumably, many full-time faculty members are also hired on the basis of their expertise. In any event, a finding of temporary status turns on evidence that the employee has been hired for only a short period, and has no reasonable expectation of being rehired. Under such circumstances the temporary employees lack a community of interest with the rest of the work force. Being hired on the basis of special expertise may be *consistent* with temporary status, but clearly does not establish it.<sup>383</sup>

The Board found the University's contention that it hired part-timers to fill positions in times of emergencies implausible, given the sheer number of lecturers employed by the College.<sup>384</sup> The inability to gain tenure and the lack of right to reappointment were not considered germane in the determination of whether the part-timers were temporary employees.<sup>385</sup> The key question, answered in the negative, was whether the University made an effort to offer reappointment once the term of the one-year contracts expired.<sup>386</sup>

More importantly, the Board found the part-time lecturers shared a substantial community of interest, contrary to its decision in *Goddard College*.<sup>387</sup>

The part-time lecturers here have in common the method by which they are hired and compensated, including a standard University memorandum of employment which sets forth terms and conditions of employment, as well as their freedom to design their own curriculum and teaching methods within the parameters of a given course description. The great majority of them work in close proximity to one another at the Employer's main campus in San

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378. In particular, the unit would consist of all part-time instructional faculty in the colleges of liberal arts, science, business, and professional studies and the schools of education and nursing, and all part-time academically closely related employees throughout the state. *See id.* at 1221.

379. *See id.*

380. *Id.* at 1222.

381. *See id.*

382. *See id.* at 1223.

383. *Id.* (emphasis in original).

384. *See id.*

385. *See id.* ("[A] disclaimer of 'tenure' does not, without more, demonstrate temporary status.").

386. *See id.*

387. *See id.*

Francisco, and thus have the opportunity for contact with other unit members. They work similar hours, and are subject to the same administrative structure.<sup>388</sup>

With its decision in *University of San Francisco*, it appeared the NLRB had established one avenue of collective bargaining activity for adjuncts and part-timers: form their own bargaining unit. The Board had found little occasion to distinguish *New York University* and allow adjuncts to form a bargaining unit with full-timers. Two years after *University of San Francisco*, it seemed this issue was about to come to the forefront. In the case of *Parsons School of Design*,<sup>389</sup> a regional director relied on *University of San Francisco* to determine that part-timers shared a community of interest.<sup>390</sup> He concluded, however, that part-timers also shared a sufficient community of interest with full-timers and found a unit composed of both full-time and part-time faculty members, distinguishing the facts from those in *New York University*.<sup>391</sup> Although he noted differences in compensation, he decided that part-time and full-time faculty did not differ significantly with respect to the relevant factors warranting exclusion in the *New York University* case.<sup>392</sup>

If there were an issue of whether adjuncts and part-timers had a choice in bargaining units,<sup>393</sup> it was never decided. The union representing both full-time and part-time faculty sought only to represent a separate unit of part-time faculty in its petition before the NLRB.<sup>394</sup> The Board found the part-time unit appropriate, given the regional director's findings based on *University of San Francisco*, but did not determine whether an overall full-time/part-time faculty unit would be appropriate.<sup>395</sup> Although the decision perhaps strengthened the *San Francisco* decision,<sup>396</sup> it would have been an interesting outcome if the Board had made the decision regarding the single unit of full-timers and part-timers. Part-timers outnumbered full-timers at Parsons 200 to 20 at the time of the Board's

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388. *Id.* at 1222.

389. 268 N.L.R.B. 1011 (1984).

390. *See id.* at 1013. The regional director based this decision on reasons set forth in *University of San Francisco*, noting that the part-timers were hired on the basis of special expertise, pursuant to identical employment contracts, common method of compensation, and similar working conditions, including the teaching of regularly scheduled classes and the flexibility of working hours. *See id.* at 1011-12 (discussing *University of San Francisco*, 265 N.L.R.B. 1221 (1982)).

391. *See id.* at 1012 (distinguishing *New York Univ.*, 205 N.L.R.B. 4 (1973)).

392. *See id.*

393. By this, I mean whether adjuncts and part-timers could join an appropriate bargaining unit with full-timers, if the facts are distinguished from those in *New York University* and subsequent decisions.

394. *Parsons Sch. of Design*, 268 N.L.R.B. at 1011.

395. *See id.* (discussing *University of San Francisco*, 265 N.L.R.B. 1221 (1982)).

396. The Board's decision to include the part-timers as a separate unit was affirmed by the Second Circuit, but an issue of election by the part-timers was remanded. *See NLRB v. Parsons Sch. of Design*, 793 F.2d 503 (2d Cir. 1986).

decision.<sup>397</sup> A decision allowing part-timers to be included with full-timers would have given the part-timers a substantial majority, also giving the part-timers the opportunity to designate a bargaining agent to represent their interests.<sup>398</sup> However, the Board did not make this decision, nor has the issue presented itself in subsequent cases.<sup>399</sup> Only one state labor case has recognized *University of San Francisco*, as an Illinois Appellate Court found that adjunct faculty at William Rainey Harper Community College could form its own bargaining unit under the Illinois Labor Relations Act.<sup>400</sup>

### 3. Factors of Consideration for Adjuncts Entering Collective Bargaining

To the extent adjuncts may have the option to enter collective bargaining, either as a joint unit with full-timers or as their own bargaining unit, the drawbacks of this activity could outweigh the benefits. Consideration of the strength of bargaining position, costs, and willingness to enter the bargaining process are factors which may limit widespread use of collective bargaining by adjunct or part-time faculty. The weight of these considerations will often differ from institution to institution, with little continuity.<sup>401</sup> Thus, while the use of collective

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397. See *id.* at 504. (discussing *Parsons Sch. of Design*, 268 N.L.R.B. 1011 (1984)). Concern that part-timers would outnumber full-timers in a bargaining unit led the Professional Staff Congress at CUNY to avoid encouragement of the 7,000 adjuncts in the CUNY system from joining the union. See *Leatherman*, *supra* note 294, at A12. Similar concern existed in the State of Washington, where adjuncts outnumber full-timers in the community college system three to one. See *id.*

398. According to one view, what the NLRB is determining when it decides appropriate bargaining units is an appropriate election unit for the designation of a bargaining agent, "which may or may not coincide with the group of jobs actually represented at the bargaining table." Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHL.-KENT L. REV. 195, 202 (1993).

From this perspective, the function of the "community of interests" test the Board applies to decide unit questions is only partly a concern for management's ease of bargaining and more importantly one of assuring sufficient homogeneity of employee interests for the purpose of selecting an exclusive representative and minimizing the number of conflicting interests the representative might be called upon to reconcile.

*Id.* at 202-03.

399. Curiously, the only NLRB case which cites *University of San Francisco* is *Parsons School of Design*. See *Parsons Sch. of Design*, 268 N.L.R.B. 1011, 1012 (1984).

400. See *William Rainey Harper Community College v. Harper College Adjunct Faculty Ass'n*, 653 N.E.2d 411, 416 (Ill. App. Ct. 1995). In this case, adjunct faculty members teaching at least six hours per semester at a community college were "educational" rather than "short-term" employees under the Illinois Education Relations Act, and were entitled to representation, even though the adjuncts had no assurance of reemployment. See *id.*

401. This is particularly true about adjuncts in different states, or a unit governed by the NLRA and one governed by state law.

bargaining is growing, its drawbacks may become apparent as these adjunct bargaining units try to bargain with the institutions.<sup>402</sup>

One simple premise in determining the potential effectiveness of part-timers in collective bargaining is this: The greater economic gain an institution makes through hiring part-time faculty, the greater bargaining strength the adjunct will have within the process.<sup>403</sup> The economic gain derived from hiring will most likely show in the proportion of adjuncts and part-time faculty compared with full-time faculty. If the institution hires a substantial number of part-timers for economic reasons, the part-timers will be better situated to overcome the potential shortcomings. Alternatively, in an institution which employs fewer adjuncts and more full-timers, the adjuncts are more likely not in a strategic situation to compel the institution to meet the adjuncts' demands.<sup>404</sup> The potential shortcomings, discussed below, are more likely to arise in the latter situation, because the adjuncts will have little bargaining power to defend against such shortcomings.

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402. These drawbacks are not limited to the educational sphere. While collective bargaining promises some redistribution of capital, the redistributive effects are often very limited. See Michael C. Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 B.C. L. REV. 329 (1998).

[J]ust as the [NLRA] protects the choice of employees to engage in collective bargaining through the leverage of joint withdrawals of labor, it allows employers to resist the leverage through the withdrawal of capital. This is the basic compromise of the Act. Both labor and capital remain free to withdraw their contributions to joint production when the other side demands an excessive proportion of the returns of that production.

*Id.* at 332. To this end, bargaining between part-time faculty and institutions may be either doomed to failure or limited, especially given the lack of leverage the part-timers will have in negotiations. See *id.* at 333.

403. This simple premise is best illustrated by the number of adjuncts voting to unionize recently. As noted above, New Jersey adjuncts voting to unionize numbered nearly 2000, while Alaska adjuncts numbered more than 1000. See Leatherman, *supra* note 294, at A12. Columbia College of Chicago itself employed about 900 adjuncts per year. See *id.* These statistics do not indicate a massive number of part-timers is absolutely necessary for effective bargaining, but at least imply the greater number of adjuncts corresponds to enough collective bargaining strength to match that of the institution.

404. This concern arises particularly given the exclusive representation model of the NLRA and state labor boards. See Finkin, *supra* note 398, at 198-99. Were part-timers and full-timers included in the same bargaining unit, with full-timers possessing the majority vote, the unit's bargaining agent is less likely to bargain effectively for the benefits the adjuncts seek. At the same time, if the adjuncts represented themselves in the same situation, except for the duty to bargain found in the NLRA, the institution would not be compelled to deal with the adjunct union. See *id.*

a. Ability to Strike<sup>405</sup>

Striking activity was a major concern and may have been the sole motivator behind the passage of the NLRA in 1935.<sup>406</sup> The ability to strike is typically a main strength in the workers' arsenal. Under the NLRA especially, it is generally presumed that under the threat of collective withdrawal of employees from work, "employers will agree to share both enhanced returns caused by union-induced increases in productivity and any extraordinary returns that may derive from some product market monopoly or some locational product or input market advantage."<sup>407</sup> For adjuncts, a major question, and one that almost necessarily relates to the number of adjuncts at an institution, is whether a collective bargaining unit has the realistic ability to strike. A smaller number of adjuncts most likely cannot afford to do so. Schools have the ability either to fire or simply replace the striking adjunct,<sup>408</sup> and are more likely to do so if the number of striking faculty members is fairly small. Where there are a greater number of adjuncts, particularly at institutions with a vast majority of part-time faculty, the institution may not have this ability. Costs and difficulty of finding replacements may be too great for a school to risk firing all striking part-time faculty members.<sup>409</sup> The danger still exists, but it is at least minimized.

The issue of bargaining units will also have an impact on the ability to strike. In almost every situation, full-time faculty will have greater bargaining power within the institution. A strike by a joint unit of full-time and part-time faculty may leave the part-time faculty in a vulnerable position.<sup>410</sup> A single unit comprised solely of part-timers will not necessarily protect the job security of the part-timers, but the ability of the school to systematically lay off a substantial number of part-time faculty is lessened.<sup>411</sup> The more likely occurrence is a joint

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405. Each of the concerns discussed here are related, with one concern often leading to one or more other concerns.

406. See Harper, *supra* note 402, at 330.

407. *Id.* at 332 (citation omitted).

408. Nothing in the NLRA prevents an employer from hiring replacements for striking employees, nor does anything require an employer to reinstate the striking employee at the end of the strike. See Samuel Estreicher, *Collective Bargaining or "Collective Begging"? Reflections on Antistrikebreaker Legislation*, 93 MICH. L. REV. 577, 577 (1994).

409. For example, in *Parsons School of Design*, discussed *supra* in the text accompanying notes 389-400, the number of part-timers outnumbered the number of full-timers 200 to 20. If all 200, or a substantial number of the 200, went on strike, the school is probably restricted from wholesale firing of the adjuncts, simply because the cost of finding 200 replacements would be lengthy and expensive. However, reverse the numbers, with 20 adjuncts and 200 full-time faculty, and the situation is much different. The adjuncts could be systematically dismissed and replaced at little cost to the school.

410. This is particularly true in a situation where the full-time faculty are a vast majority in the bargaining unit. If the school sees it as necessary to cut back the number of faculty for economic reasons, it will be the part-timers who are dismissed.

411. This assumes a part-time unit would conduct a strike. A large unit of part-timers conducting a strike would disrupt the entire school system, leaving the workload to the full-timers. At an institution such as Columbia College of Chicago, where the school employs 900

strike by one union representing separate bargaining units at an institution. This happened in March 1998, when approximately 1300 unionized faculty struck at Community College in Philadelphia.<sup>412</sup> The union, an affiliate of the American Federation of Teachers, represented three separate bargaining units, comprised of full-time faculty, part-time faculty, and 200 clerical and other support workers.<sup>413</sup> The union in that case sought to move toward parity between full-time and part-time faculty salaries, among other demands.<sup>414</sup>

Difficulty in the ability for a part-time unit to strike lies where the part-timers do not strike cooperatively with the full-time faculty. At Columbia College of Chicago, full-timers were divided over the formation of the adjunct bargaining unit.<sup>415</sup> Some were sympathetic, signing a letter supporting unionization.<sup>416</sup> Others opposed it, noting concerns about rising tuition and open admissions standards.<sup>417</sup> Were a conflict between part-timers and the institution to develop, and full-timers and part-timers continued to have conflicting interests, whether the separate part-time unit could effectively strike without the support of the full-timers is a serious question.<sup>418</sup> Conflicts of interest found where full-timers and part-timers are represented in the same bargaining unit illustrate this potential problem. Full-time professors often make decisions whether or not to hire adjuncts, and often supervise the adjuncts.<sup>419</sup> Striking activity by adjuncts without support of full-time faculty could meet opposition on two fronts—one with the institution, the other with the full-time faculty.

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part-time faculty and only 200 full-time faculty, a potential strike would effectively halt most school activities. The analysis leading to economic incentive to find replacements lessens considerably, as does the danger of a great loss of jobs by the adjuncts.

412. See *Collective Bargaining: Stalled Contract Talks Lead to Strike at Philadelphia Community College*, 36 Gov't Empl. Rel. Rep (Warren, Gorham & Lamont) 312, 312 (Mar. 16, 1998).

413. See *id.* at 313.

414. See *id.* The average salary for full-time faculty was \$51,400, while the average for part-timers was \$10,000 per year. Part-timers taught roughly half the teaching load as full-timers. See *id.*

415. See Leatherman, *supra* note 294, at A12.

416. See *id.*

417. See *id.*

418. As of July 1998, there does not appear to be a situation where a part-time bargaining unit struck without the support of the full-time unit. Perhaps a much more likely occurrence is part-timers replacing full-timers in the event of a strike by full-timers. See, e.g., *Work Stoppage: No End in Sight for Strike by Temple University Faculty*, 28 Gov't Empl. Rel. Rep (Warren, Gorham & Lamont) 1163, 1164 (Sept. 17, 1990) (striking full-time faculty replaced by graduate student assistants and part-time faculty members).

419. See Leatherman, *supra* note 294, at A12. One part-timer in Washington noted, "I would no more want the full-timers to represent part-timers than I would want the British to represent the American colonies." *Id.*



### b. Job Security

Job security of adjuncts as a collective affects bargaining beyond the threat of strikes. An institution relying heavily on adjuncts is more likely to rehire a substantial number of them rather than hire new faculty members.<sup>420</sup> This does not necessarily equate to greater bargaining strength for the adjuncts, but it does place a burden on the institution if it must choose between conceding to some degree with the adjuncts' demands or simply hiring new adjuncts.<sup>421</sup> At the same time, similar to the concern about the ability to strike, fewer adjuncts at an institution will make successful organization less likely. The vulnerability to firing often makes organizing adjuncts alone difficult.<sup>422</sup>

### c. Costs of Collective Bargaining

Strike threats and job insecurity necessarily relate to an economic analysis of collective bargaining, but these are not the only costs. Organizing campaigns will impose costs not only in the form of organizational strikes, but also resources spent on publicity, litigation, and discriminatory discharges.<sup>423</sup> Other costs, also relating to strikes,<sup>424</sup> occur in negotiations and enforcement of the collective agreement, including resources spent in arbitration and litigation.<sup>425</sup> These costs must be taken into consideration by adjuncts to determine the efficiency or equity of unionization and collective bargaining.<sup>426</sup> The benefits of collective

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420. For example, the petitioner in *University of San Francisco* attempted to argue that adjunct faculty were temporary employees but made no showing to the board the adjuncts were not offered reemployment. See *University of San Francisco*, 207 N.L.R.B. 12, 13 (1973).

421. Economic concerns will undoubtedly exist at the bargaining table. Administrators at Columbia College estimated it would need to double the \$6 million per year spent on faculty salaries to meet the terms demanded by the part-timers. See Leatherman, *supra* note 294, at A12. But hiring new adjuncts may be equally as costly, considering the loss of skilled professionals employed as adjuncts and the time and manpower needed to fill vacancies. If the vacancies are substantial, the school may be more likely to meet the demands or at least bargain with adjuncts for better treatment.

422. See *id.* at A12.

Typically, unions have found it easier to organize part-timers together with full-timers. The unions have argued that the two groups share similar interests, and that greater numbers equal greater strength. Moreover, part-timers are tough to organize alone—they're transient, they don't have much money to pay dues, and they are more vulnerable to firing.

*Id.*

423. See Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 440 (1992).

424. Again, whether part-timers possess a collective willingness to strike remains a question. The protests in the state of Washington and at CUNY in 1998 certainly possessed the flavor of a walkout, but there does not seem to be a widespread threat of walkouts by part-time bargaining units without the support of their full-time colleagues. See Leatherman, *supra* note 294, at A12.

425. See Dau-Schmidt, *supra* note 423, at 440.

426. See *id.*

bargaining—arguably but potentially small, given the part-timers' general lack of bargaining power<sup>427</sup>—could be outweighed by greater costs associated with the activity.<sup>428</sup>

Before weighing the costs and benefits of unionization for adjuncts, however, one should be aware of the situation of the institutions. Use of adjuncts is itself the most important benefit to the institution. Organizationally, it allows institutions to maintain flexible schedules, since institutions can tailor their schedules to meet student demands through the use of adjunct faculty.<sup>429</sup> Fiscally, the benefit to the institution is much the same.<sup>430</sup> Any concession on the part of the institution, then, necessarily equates to a cost, since the benefit of the use of adjuncts lessens.<sup>431</sup> The resistance to institutions bargaining with adjuncts is evident. While some degree of concession is not unlikely, this concession cannot occur unless the adjuncts are willing to accept some degree of hardship in return for the concession.<sup>432</sup>

What degree of hardship are the adjuncts willing to accept to receive the benefits they desire?<sup>433</sup> To answer this question, one must consider what the adjuncts might offer in return for better working conditions. Some probable

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427. The caveat "arguably but potentially small" indicates something of a split in viewpoint from the perspective of the adjunct. Surely, one might argue that adjuncts presently have few rights or benefits, so that any gain derived from collective bargaining is a measurable gain in itself. However, when weighed against the potential costs, including the potential for widespread loss of jobs, the benefit gained could easily be outweighed by these losses.

428. See Dau-Schmidt, *supra* note 423, at 440.

429. This is especially true at community colleges, where several administrators have noted that part-timers allow them to offer more classes in more subjects at more convenient hours than would be possible with a full-time staff. See Tammie Bob, *Degrees of Difficulty: Part-Time College Teachers Live the Tough Lessons of '90s-Style Economics*, CHI. TRIB., July 12, 1998, § 10 (Magazine), at 10.

430. According to the spokesperson at the College of DuPage in Illinois, which employs as many as 1400 part-timers during a given quarter, "It would be fiscally tough to have 1,400 full-time faculty available at those periods." *Id.* This statement is echoed elsewhere as well. According to one college administrator to whom I spoke about the issue, "You have to understand the school would not hire the adjuncts if it could afford to hire all full-time professors." Although I shall not identify the particular administrator, I should note the school referenced in the interview has neither full-time nor part-time faculty unions.

431. Possibly, a concession by any employer necessarily relates to a cost, since the labor market is defined by return dividends both from the standpoint of the employer or employee. See Dau-Schmidt, *supra* note 423, at 424. Yet in few employment settings are such a large group of collective employees so easily replaceable. Moreover, in few employment settings are such replaceable employees so qualified. See Bob, *supra* note 429, at 10 (quoting an administrator, who commented that part-timers bring real-world experience to students, especially in technical fields).

432. See Leatherman, *supra* note 294, at A12 ("On other campuses [than Columbia College in Chicago], where the union movement spread earlier, part-timers are the ones feeling the pain of bargaining collectively with the full-timers. At CUNY, members of Adjuncts Unite were rallying to demand payment for the hours spent advising students.").

433. I assume for these purposes the desires of adjuncts would include those mentioned throughout this Article: better wages and benefits, better treatment and working conditions, some job security, and respect.

results are that adjuncts will take on more duties and responsibilities,<sup>434</sup> will teach more classes,<sup>435</sup> serve on more committees,<sup>436</sup> and generally take on more of the tasks normally assigned to a full-time professor,<sup>437</sup> without necessarily being compensated for the extra time invested in these activities. If these results do occur, one must question whether this exchange is worth the return the school is willing to offer. Adjuncts in general teach for a variety of reasons, not all of which relate to the need for employment.<sup>438</sup> They may want better working conditions, but it must be questioned how many of them are willing either to risk their jobs to attain better conditions or to increase their duties to the school, which may make the part-time position something more than the adjunct desired in the first place. These are simply considerations, but how united adjuncts deal with these issues will dictate how successful the collective bargaining process can be.

Conversely, of the limited remedies available to adjuncts, collective bargaining may be the most effective.<sup>439</sup> The gains achieved through the bargaining process

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434. See Leatherman, *supra* note 294, at A12. Serving as faculty advisors is a probable duty or responsibility should a school seek return in the bargaining process. Full-time faculty often serve as faculty advisors to students, student organizations, and other organizations on campus.

435. Some adjuncts trying to make a living teaching part-time have had to teach a number of classes at different institutions. A *Chicago Tribune* article discussed one teacher in Illinois who teaches as many as seven or eight classes per week at five different schools. See Bob, *supra* note 429, at 10. In 1997, that teacher made about \$33,000, with no health insurance and no guarantee of future work. See *id.* Whether a school through bargaining would require adjuncts to teach more is unknown, but if the institution could not afford full-time faculty and had to reduce the number of adjuncts, it would probably be the adjuncts who would be asked to teach more classes.

436. Some schools seem to allow adjuncts to serve on faculty committees, but it is not generally required. See *id.*

437. At some point, one must reconsider the titles "full-time" and "part-time" if adjuncts were to take on additional responsibilities. The examples are seemingly endless of part-timers who teach what would seem to be a full-time load, but are compensated minimally. See, e.g., *id.* (describing a part-time faculty member with 40 years teaching experience who taught an average of six classes per semester and averaged \$21,000 per year).

438. Administrators often argue that not all adjuncts are unhappy with their positions, noting many adjuncts are professionals outside the classroom. One administrator noted he felt "a very tiny minority" of adjuncts felt they were exploited or were upset with their working conditions. See Robin Wilson, *For Some Adjunct Faculty Members, the Tenure Track Holds Little Appeal*, CHRON. HIGHER EDUC., July 24, 1998, at A9. Some adjuncts welcome the flexibility and freedom of working as a part-time professor. One highlighted adjunct faculty member from the University of San Francisco actually turned down an offer to become a full-time professor, saying the full-time position would prevent him from doing "the other things [he loves] to do." *Id.* A 1993 survey showed that 52% taught part-time because they preferred to, with 86% saying they were satisfied with their jobs. See *id.* (providing figures from a survey published by the National Center for Education Statistics). Author and professor David Leslie, however, said these statistics were misleading, noting many teachers, particularly in the humanities and English, were unhappy with their situation. See *id.*

439. Constitutional protection will not occur until after the recognized rights are violated. See *supra* Part II.A. Individual contracts with institutions do not provide noteworthy relief, both because an adjunct lacks individual bargaining power and because contract theories are not successful. See *supra* Part II.B.

may seem minimal,<sup>440</sup> but any gain for a group of individuals employed with minimal recognition should be considered a victory in itself. If the gains achieved through bargaining collectively can improve the current at-will status of the adjuncts, then collective bargaining should be deemed a success.<sup>441</sup> Even if the returns from the bargaining process are not viewed as a success, at the very least adjuncts through the unionization process have a venue where they might voice their concerns and receive a response.<sup>442</sup> The respect adjuncts desire, though perhaps partly attainable through bargaining with the school,<sup>443</sup> might be attained through mutual respect with one another, made possible by the process of unionizing and voicing concerns. Viewed in this light, the gestalt psychology<sup>444</sup> colloquialism, "the whole is greater than the sum of its parts," has appropriate

440. For example, the adjunct union at Columbia College of Chicago demanded nearly double the average salary for adjuncts per class. See Leatherman, *supra* note 294, at A12. Even this pay raise would have raised the minimum salary to only \$3000 per semester. See *id.*

441. Providing job security should not be confused with tenure. At the very least, as noted in the recommendations, see *infra* Part III, adjuncts should be entitled to due process. The "at-will" status referred to here also does not apply to all adjuncts, since many are under a one-year or one-term contract to teach. Beyond the length of the contract, however, adjuncts often have no guarantee of rehiring, even for exemplary performance. I do recognize the recommendation for job security has little or no legal foundation, but in terms of equity—and especially in terms of bargaining issues—some security in employment should be offered.

442. See Bob, *supra* note 429, at 10. Part-timers often do not interact with each other, both because adjuncts are typically transients and because, to quote the president of a part-time faculty association, the schools often "prefer to keep their part-time faculties in 'conditions of non-communication.'" *Id.* (quoting Barbara Dayton, President of Oakton's Part-Time Faculty Association).

443. See *id.* One adjunct faculty organization's members

have few concrete gains to show for their union representation, but feel they are treated with some respect. Course assignments are made several months in advance of a term, awarded in order of seniority. Teachers get paid sick leave "if not abused," and are reimbursed for mandatory department meetings. They have space to meet with students. Their pay is slightly higher than that offered by other community colleges: about \$1,800 per course, after 11 years of service, a little more for Ph.D's. It's still not quite a living wage, and [the] adjuncts are well represented and vocal among those who have gathered to reach out and join forces.

*Id.* at 13-14.

444. See Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 551 n.208 (1992).

Simply put, *gestalt* is the concept underlying an early twentieth-century school of psychological thought that the totality of any event cannot be explained merely as the aggregate of its components. With regards to perceptual organization, *gestalt* theory holds that the character of a total event will govern how its components are perceived, or whether they are perceived at all. The phrase "the whole is greater than the sum of its parts" and the term "holistic" are colloquialisms associated with *gestalt* psychology.

*Id.* (each emphasis in original); see also WOLFGANG KÖHLER, *GESTALT PSYCHOLOGY: AN INTRODUCTION TO NEW CONCEPTS IN MODERN PSYCHOLOGY* (1947); K. KOFFKA, *PRINCIPLES OF GESTALT PSYCHOLOGY* (1935).

meaning.<sup>445</sup> No longer are adjuncts "something . . . added to another thing but not essentially a part of it,"<sup>446</sup> but a cohesive group of employees with common concerns and goals seeking better treatment.

### III. RECOMMENDATIONS

#### A. Non-Legal Recommendations

According to one professor,

I've gradually come to believe that if the old injustices are to be set right, adjuncts and teaching assistants will have to act themselves in an upsurge from below, and that they know better what they want and ought to do . . . . Unionizing is one promising development . . . . Maybe many of the exploited really prefer inaction, in the hope that they too can at last become exploiters or in the sad conviction that in the present economy any tolerable job is better than none.<sup>447</sup>

Higher learning institutions exploit adjunct faculty members.<sup>448</sup> The institutions should make attempts to understand and work with their adjunct faculty.<sup>449</sup> First, the institutions should seek to understand the aspirations of each adjunct faculty member it hires. The institution may be able to satisfy the goals of both the adjunct and the university through better hiring practices. Although institutions say they are driven by the market, it is unreasonable to believe the market of college courses is so dynamic that the student population significantly changes what it wants to learn from session to session. Hiring should be done sooner and no later than a month before the session begins.<sup>450</sup> These institutions can predict

445. See Collins & Skover, *supra* note 444, at 551 n.208.

446. WEBSTER'S, *supra* note 11, at 27.

447. William Craig Rice, *Interview*, James Sledd, ADJUNCT ADVOC., May-June 1996, at 28-29.

448. See *id.* at 28.

449. The National Education Association ("NEA") recommends, with respect to appropriate uses of part-timers, schools should use part-timers when full-time faculty are not available and enrollment unexpectedly increases; when a specialized class is offered outside the expertise of full-time faculty; or when an experimental program is offered. The NEA would not consider cost savings as an appropriate use. See STANDING COMM. ON HIGHER EDUC., *supra* note 14, at 6-13.

450. The NEA recommends the inclusion of academic due process as part of a school's policy. Part-time faculty due process rights should reflect those of full-time faculty including:

1. [T]imely appointment letters that clearly specify the nature of their relationship with the institution in the short and long term;
2. [T]imely written notice of reappointment and nonreappointment, the standards and criteria on which they will be evaluated for reappointment, and any change in the terms of their status or relationship to the department or institution;
3. [A]cademic due process, i.e., the right to confer over the terms and conditions of their appointment, the right to file grievances or appeal negative decisions, to have a fair hearing, and to receive timely settlement of their grievances. In particular, faculty must be guaranteed the right to complete the term of their contracts, except for just cause, and to appeal through appropriate

the enrollment when the time comes for the semester to begin. No reason exists for the adjunct to be hired or released during the first week of school. Adjuncts who are released due to enrollment changes should be compensated for their course preparation and reliance on the institution to provide employment for that term.<sup>451</sup> At a minimum, schools should afford the adjuncts notice of the release and an opportunity for a grievance to be heard.<sup>452</sup>

The institution should establish an orientation program at the institutional level and the departmental level. The institutional orientation would cater mostly to new employees. The departmental orientation would give direction to the adjunct in regard to teaching materials to facilitate the succession of the student through the department.

P.D. Lesko, executive editor of *The Adjunct Advocate*, challenges both employers and adjuncts to look toward developing employment paradigms in which adjunct faculty resources are used wisely and responsibly.<sup>453</sup> Lesko begins with the perception, in many departments, that adjunct faculty are disposable. In exploring why this perception has arisen, Lesko believes that it is because adjuncts are not hired responsibly or evaluated rigorously.<sup>454</sup> Thus adjuncts are deemed "throwaways" in the departments where hiring and evaluation are not handled with care.<sup>455</sup> Lesko urges the participation of both adjuncts and faculty

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procedures the premature termination of their contract;

4. [F]air and equitable evaluation by peer or other appropriate persons, with the results of such evaluation being given to them in writing and with an opportunity to respond and seek remedy.

*Id.* at 7.

451. The American Association of University Professors ("AAUP") recommends that not only should part-timers not be appointed at the last minute or suffer years of term-by-term contracts, they should be paid for preparation time when the classes are canceled. *See* AMERICAN ASS'N OF UNIV. PROFESSORS, POLICY DOCUMENTS AND REPORTS 47, 52 (6th ed. 1984).

452. Although the Due Process Clause of the Fourteenth Amendment may not apply to all adjuncts, the protection of notice and opportunity to be heard should be afforded to all faculty. The AAUP recommends that part-time faculty should have the same due process protection as full-time faculty and access to the same grievance procedures. *See id.* at 52. The NEA advances a similar recommendation. *See* NATIONAL EDUC. ASS'N, *supra* note 17, at 7.

453. *See* P.D. Lesko, *From the Editor*, ADJUNCT ADVOC., Nov.-Dec. 1996, at 2, 2. Lesko's attendance at the October 1996 conference on adjunct faculty at Madonna University prompted this editorial. The keynote speaker was Dr. David Leslie, co-author of *The Invisible Faculty*. *See* source cited *supra* note 47. Dr. Leslie asked, "Are we using enough adjunct faculty?" He also wondered if the academic community is taking "full advantage of community resources?" Lesko interprets Dr. Leslie to mean that the academic community is not making good use of the adjunct faculty resources available. Dr. Leslie went on to say, "The academic employment system is going to change. The signs are very clear that if it doesn't change from the inside, it is going to be changed from the outside." Lesko is wary, however, that what may seem like welcome news to adjuncts may not be so. Lesko says, "[T]ake a close look at the use of temporary labor outside of academe, and I am not so sure adjuncts (or higher education for that matter) would truly benefit from any outside intervention." Lesko, *supra*, at 2 (parenthetical in original).

454. *See* Lesko, *supra* note 453, at 2.

455. *See id.*

unions in insisting on more careful hiring and evaluation standards. Lesko further cites the need for adjuncts to be included not only in departmental communication, but in institution-wide communication as well. Adjuncts must see to it that they stay informed, attend meetings, and participate. Adjuncts who want to be treated like integral members of their departments need to behave as if they were integral members of their departments. Lesko also recommends that adjuncts research and publish in order to gain the esteem of colleagues and students.<sup>456</sup>

Drs. Roueche and Roueche, authors with Dr. Mark Milliron of *Strangers in Their Own Land: Part-Time Faculty in American Community Colleges*,<sup>457</sup> in response to the question, "Within the next ten years, what is the most important change that college administrators are going to have to make with respect to their employment of adjunct faculty?" recommend:

They must get serious about why they hire part-time faculty, tying their hiring to college mission and goals; they must find ways to integrate them into the institution, to make them viable and contributing components of the instructional process, to provide professional developmental activities available to full-timers, and to evaluate their performance and use the evaluation to design opportunities for improvement of their performance.<sup>458</sup>

Additionally, the authors make a point unstressed by others in the field. They responded to the question, "If colleges are not selecting adjunct faculty carefully, what are the most serious ramifications for the system and the student?" by stating: "On the one hand, they are as serious as the ramifications for hiring full-timers without careful consideration. Part-timers, given their numbers and their tendency to group within particular disciplines, have great influence and wield considerable power—they *are the college* to an extraordinary number of students."<sup>459</sup>

The authors of *The Invisible Faculty* recommend that institutions relying on increased use of part-time faculty develop management strategies to maximize the efficiency of scheduling, supervision, and control of support services.<sup>460</sup> More importantly, institutions must develop methods to combat loss of effectiveness. In their case study on one campus, deans and vice-presidents readily noted "tangible evidence of erosion of the infrastructure in the face of under- or unfunded enrollment increases," but also feared that their institution was "in

456. *See id.* Lesko adds,

In short, make adjunct employment resemble as closely as possible tenure-line employment. It is only by setting high standards and holding adjunct faculty to them that the academic community will begin to, as Dr. Leslie put it, "use enough adjuncts," and "take full advantage of community resources." As long as a two-tier system of employment exists, there will be as [sic] "us" versus "them" mentality among full-time faculty and adjuncts. And it is that mentality which fosters the irresponsible use of temporary labor in higher education.

*Id.*

457. JOHN E. ROUCHE ET AL., *STRANGERS IN THEIR OWN LAND: PART-TIME FACULTY IN AMERICAN COMMUNITY COLLEGES* (1995).

458. P.D. Lesko, *Interview, The Drs. Roueche*, *ADJUNCT ADVOC.*, Nov.-Dec. 1996, at 12, 15.

459. *Id.* at 12 (emphasis in original).

460. *See* GAPP & LESLIE, *supra* note 47, at 101.

danger of losing its sense of community and values" and created an institution-wide program to help part-timers become an integral part of the academic life of the college.<sup>461</sup>

The salary paid to an adjunct should be aligned with that of the full-time faculty. Not equal, but aligned. A difference exists between the full-time faculty member and the adjunct in terms of time and commitment that can be given to the university. However, taking advantage of the adjunct by paying absurdly low wages serves neither the adjunct nor the school.<sup>462</sup> The institution could pay this adjunct to his or her satisfaction so the adjunct is able to commit to one university rather than running from university to university trying to make a living. An increase in the adjunct wage dollar is not the only means by which to accomplish higher pay. The institution could offer a benefit package relative to the adjunct's commitment to the institution. The cost of providing the benefits does not increase incrementally with each new appointment. The benefits are already in place. It only makes sense for the institution to include part-timers in a type of compensation that does not cost anything but would certainly boost morale and performance.

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461. *Id.* The vice president summarized this unique effort:

Part-time faculty don't have the institution's mission in focus. They do not know as much about the "open-door" student body as the full-time faculty know. They probably aren't as ready to diagnose problems and give individual help. Part-time faculty don't know where to send students who need help, where to get assistance themselves, or other avenues to help, and so on. . . . We have put together our teaching/learning project, which includes a special committee on issues affecting part-time faculty, to try to preserve the special values we have built [here] and to translate those values into teacher behaviors for the next generation of faculty.

*Id.*

462. Gappa and Leslie warn against succumbing to the "false economies" of part-time faculty use with the following example:

[A]n associate professor making \$40,000 a year may have a half-time teaching assignment (meaning \$20,000 is accountable to other work) and teach four courses a year. With \$20,000 of her salary assigned to teaching, some of which is "indirect" (including advising and related duties), a full-time associate professor may be producing a three-credit course for somewhat less than \$5,000. Although a part-timer may teach a course for about one-third of that, say \$1,500, the part-timer has to be hired, oriented, supervised, and evaluated to a greater extent than the full-timer. Space, equipment, and support services must be provided for each part-timer as an individual, not as a full-time-equivalent member of the faculty. The inefficiencies involved in using many part-timers who teach only one or two courses are most keenly felt, perhaps, in the paperwork generated to continuously reappoint them. After all this effort (and cost), the part-timer does not always stay long enough to accumulate valuable experience. Consequently, the salary expenditure bears little return on the investment, as it would be in the case of a full-timer, who becomes more valuable with years of experience. For all these reasons, the direct dollar savings per course are not as dramatic as they appear when the only variable being examined is the actual salary paid per course.

*Id.* at 103-04 (parentheticals in original).



Colleges and universities need to recognize the resource pool they have in the adjunct faculty. The adjunct needs equitable treatment to encourage fairness in comparison to the treatment of full-time faculty.<sup>463</sup> The purpose is not to achieve parity among the faculty. The purpose is to treat adjuncts as contributing parts of the organization while recognizing their differences. Institutions should examine the effects of policy on part-time faculty and make improvements consistent with their financial resources and educational objectives.

### *B. Legal Recommendations*

As described by the title of the legal remedies part of this Article,<sup>464</sup> the remedies an adjunct faculty member may seek are indeed limited. Solutions rarely exist in the law. Even where remedies exist, the protection afforded may nonetheless be unsatisfactory. Common sense may dictate these employees enter freely into these positions, but this attitude cannot deprive adjuncts of all avenues of protection which should be afforded to them by law.

Collective bargaining agreements could provide the best solution to the problem. The National Labor Relations Act was designed for the purpose of allowing employees to bargain collectively for their own "mutual aid or protection."<sup>465</sup> As this Article has discussed, the adjunct performs many of the same duties as a full-time faculty member. Through these collective bargaining agreements, adjuncts can stand on the same footing proportionately as full-timers, without detracting substantially from the full-timers' benefits. While tension between the full- and part-timers may not cease, it will be eased as representatives for both formulate appropriate agreements to protect all interested parties. Such a situation must be a more appropriate solution than excluding the adjunct from collective bargaining.

Without collective bargaining, adjuncts are left to negotiate individually with the schools. A school possesses bargaining power far greater than that of an adjunct, leaving the adjunct with little recourse but to accept the school's proposal or reject the position entirely.<sup>466</sup> While this is certainly consistent with the idea of an individual's freedom to contract, it does not take into consideration an adjunct who has relied on the position over the course of several terms. Theories of estoppel will not aid this adjunct either. The better solution is to include the adjuncts in the collective bargaining agreement to avoid the problems of this individualized negotiation.

In the absence of these agreements, the adjunct at the very least should be provided with due process. While the Constitution will protect adjuncts who have entitlement to their positions at state schools,<sup>467</sup> no adjunct should have to rely on

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463. *See id.* at 252.

464. *See supra* Part II.

465. 29 U.S.C. § 157 (1994); *see also supra* text accompanying note 311.

466. Despite the unequal bargaining power, an argument for a finding of an adhesion contract is almost out of the question. Such agreements will most likely not violate public policy.

467. *See supra* Part II.A.2.

a constitutional argument to protect his or her right to due process. An adjunct should not be considered a typical "at-will" employee who can be discarded without any notice or opportunity to be heard. Adjuncts are generally highly trained and educated individuals who dedicate themselves to these teaching positions. Denying an adjunct adequate notice of termination, even where no cause existed, should seem an unconscionable occurrence.<sup>468</sup>

As educational associations band together to protect the rights of adjuncts, perhaps the proper treatment of adjuncts could become a factor for a school to receive accreditation. Both the NEA and the AAUP recommend adjuncts be afforded due process.<sup>469</sup> Appropriate accreditation agencies should take these recommendations into consideration when evaluating a school to determine the school's status. Many schools obviously fail to consider the adjuncts' status, so this attitude should be reflected in the school's status as an educational institution.

### CONCLUSION

Professor James Sledd concluded,

The exploitation of adjuncts is just one part of a whole system of exploitations in the indivisible nation which the transnationals would like to cut up and have for lunch. Higher education simply follows the corporate model, which systematically enriches the haves and impoverishes the haven'ts. Like CEOs employing temporaries in order to avoid the payment of fringe benefits and to preserve flexibility in their pursuit of profits for themselves and their stockholders, university administrators employ adjuncts so that they can put money into projects that they really care about . . . .

Ultimately, however, any serious reform will have to be driven, not by talkative ancients, but by the exploited themselves—by the adjuncts and [teaching assistants], who should make common cause with debt-ridden students and their strapped parents. The exploited know their situation, their needs and wishes, better than anybody else. So long as they don't sign the delusive contract as team-players in the great [game] of screw-or-get-screwed, there's hope.<sup>470</sup>

Institutions need to stop hiding behind the old philosophy that the reason adjuncts are hired and fired as if they were moving through a revolving door is because of erratic enrollments. Institutions cannot claim ignorance of the problem. The mistreatment of adjunct faculty has become common knowledge. Institutions serve their own economic and scheduling needs at the expense of the adjunct. This knowledge has been translated by institutions into treating adjuncts as "second-class" teachers. Nevertheless, institutions rarely feel the consequences

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468. Obviously the term "unconscionable" used here cannot stand for a term in contract law, since a court will not find these agreements to be unconscionable. Instead, the term is used to describe a situation where an adjunct is terminated without adequate notice and without cause.

469. See *STANDING COMM. ON HIGHER EDUC.*, *supra* note 14, at 7; *Status*, *supra* note 14, at 52.

470. Rice, *supra* note 447, at 28.

of their hiring and employment practices. Better solutions to the problem exist and must be utilized by institutions:

Finding the best faculty, supporting good teaching, and creating a campus environment in which people work together collegially and productively are the big challenges in putting together high-quality academic programs. Using part-time faculty has enabled some . . . institutions to draw on a pool of talented professionals, bring new ideas and fresh teaching strategies to academic programs, and take risks in curriculum innovation. In the best cases, part-time faculty help departments focus on their educational goals and develop a rich internal dialogue about their teaching, their students, and their curricula.

These institutions have improved their academic programs *because* they employ part-time faculty, not in spite of their part-time faculty. The institutions are models of academic *health* and academic *integrity* because they operate on the assumption that all their faculty are members of the academic profession. This assumption and the acknowledgment that major challenges were facing their institutions have led full-time faculty and administrators alike to integrate part-time faculty rather than to exclude them.<sup>471</sup>

If schools cannot step forward and provide equitable treatment of adjunct faculty members, then the law should provide the appropriate protection. Consideration in accreditation is just one possible solution. Legislatures and courts should realize the treatment of these professional educators is inadequate. Whatever the specific solution, the general answer should be this: recognize adjuncts as professionals, treat adjuncts as professionals, and afford adjuncts the rights and protections they deserve as professionals.

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471. GAPP & LESLIE, *supra* note 47, at 277 (each emphasis in original).